92-817

No. ——

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SOLDIER OF FORTUNE MAGAZINE, INC.
and OMEGA GROUP, LTD.,
Petitioners,

v.

MICHAEL F. BRAUN and IAN BRAUN,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the First Amendment require, before crippling damages are imposed upon a publisher, that a third-party advertisement clearly and on its face solicit criminal conduct, or is it sufficient, as held by the Court of Appeals, that the advertisement can be read as posing a substantial risk of harm to the public?

PARTIES TO THE PROCEEDINGS

Petitioner and defendant-appellant below Soldier of Fortune Magazine, Inc. is a non-publicly traded corporation organized under the laws of Colorado. Petitioner and defendant-appellant below Omega Group, Ltd. is a non-publicly traded holding company organized under the laws of Colorado. Pursuant to Supreme Court Rule 29.1, petitioners note that Soldier of Fortune Magazine, Inc. has no subsidiaries and is a wholly owned subsidiary of Omega Group, Ltd. Petitioners further note that Omega Group, Ltd. has no parent and no non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
PERTINENT CONSTITUTIONAL PROVISION	2
STATEMENT OF THE CASE	2
A. Factual Background	2
B. Proceedings Below	4
REASONS FOR GRANTING THE WRIT	6
I. THE DECISION BELOW IS INCONSISTENT WITH PRIOR DECISIONS OF THIS AND OTHER COURTS, WHICH HAVE ALLOWED COMMERCIAL SPEECH TO BE ABRIDGED ONLY IF IT IS CLEARLY ILLEGAL, MISLEADING OR FRAUDULENT ON ITS FACE	7
A. Prior Decisions Generally	7
B. The *Eimann* Decision	9
C. The Savage Ad Was Not Clearly Illegal on Its Face and Thus the Decision Below Is Inconsistent With Prior Decisions of This and Other Courts	10
II. THE DECISION BELOW ADOPTS A STANDARD THAT WILL OPEN THE FLOODGATES TO CRIPPLING AND UNPRECEDENTED LAWSUITS AGAINST PUBLISHERS	13

TABLE OF CONTENTS—Continued

Page

III. THE BROAD STANDARD ADOPTED BY THE ELEVENTH CIRCUIT WILL LIMIT CORE SPEECH 21

IV. IN PRACTICAL TERMS, THE BROAD STANDARD ADOPTED BY THE COURT OF APPEALS WILL HAVE A SUBSTANTIAL ADVERSE IMPACT UPON THE PRINT AND ELECTRONIC MEDIA 24

CONCLUSION 26

APPENDICES

APPENDIX A:

Opinion of the United States Court of Appeals for the Eleventh Circuit 1a

APPENDIX B:

Memorandum Opinion of the United States District Court for the Middle District of Alabama Denying Petitioners' Post-Trial Motions 25a

APPENDIX C:

Memorandum Opinion and Order of the United States District Court for the Middle District of Alabama Denying Petitioners' Summary Judgment Motion 39a

APPENDIX D:

Judgment of the United States Court of Appeals for the Eleventh Circuit 49a

TABLE OF AUTHORITIES

Cases Page

Ad World, Inc. v. *Doylestown*, 672 F.2d 1136 (3d Cir.), *cert. denied*, 456 U.S. 975 (1982) 22
Adult Film Ass'n v. *Times Mirror Co.*, 3 Media L. Rptr. 2292 (Cal. Super. Ct. 1978), *aff'd*, 97 Cal. App. 3d 77, 158 Cal. Rptr. 547 (1979) 22
Armijo v. *Ex Cam, Inc.*, 656 F. Supp. 771 (D.N.M. 1987), *aff'd*, 843 F.2d 406 (10th Cir. 1988) 17
Associates & Aldrich Co. v. *Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971) 22
Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977) 8
Bigelow v. *Virginia*, 421 U.S. 809 (1975) 21
Bill v. *Superior Court*, 137 Cal. App.3d 1002, 187 Cal. Rptr. 625 (1982) 14
Bolger v. *Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) 8
Bose Corp. v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) 11
Cantwell v. *Connecticut*, 310 U.S. 296 (1940) 23
Carey v. *Population Servs. Int'l*, 431 U.S. 678 (1977) 8
Central Hudson Gas & Elec. Corp. v. *Public Serv. Comm'n of New York*, 447 U.S. 557 (1980) 7, 8, 21
Cipollone v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992) 17
City of Columbia v. *Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991) 14
DeFilippo v. *National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982) 14
Dunagin v. *City of Oxford*, 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984) 8, 9, 10, 13
Eimann v. *Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990) ..... *passim*
Herceg v. *Hustler Magazine*, 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) 14
Hustler Magazine, Inc. v. *Falwell*, 485 U.S. 46 (1988) 23

TABLE OF AUTHORITIES—Continued

	Page
Lewis v. *Columbia Pictures Indus., Inc.*, 20 Med. L. Rptr. 1807 (Cal. Super. Ct. 1992)	20
McCollum v. *CBS Inc.*, 202 Cal. App.3d 989, 249 Cal. Rptr. 187 (1988)	14
Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974)	22
Mississippi Gay Alliance v. *Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977)	22
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964)	14, 23, 25
News & Sun-Sentinel Co. v. *Board of County Comm'rs*, 693 F. Supp. 1066 (S.D. Fla. 1987)	26
Olivia N. v. *National Broadcasting Co.*, 126 Cal. App.3d 488, 178 Cal. Rptr. 888 (1981), *cert. denied*, 458 U.S. 1108 (1982)	15
Perkins v. *F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985)	16
Pittsburgh Press Co. v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973)	8, 9, 10, 13, 26
Posadas de Puerto Rico Assocs. v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986)	7, 8
Sakon v. *Pepsico, Inc.*, 553 So.2d 163 (Fla. 1989)	18
United States v. *Goldstein*, 431 F. Supp. 974 (D. Kan. 1976)	21
Vaill v. *Oneida Dispatch Corp.*, 129 Misc.2d 477, 493 N.Y.S.2d 414 (Sup. Ct. 1985)	24
Virginia State Bd. of Pharmacy v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976)	7, 21
Waller v. *Osbourne*, 763 F. Supp. 1144 (M.D.Ga. 1991), *aff'd per curiam*, 958 F.2d 1084 (11th Cir.), *cert. denied*, 61 U.S.L.W. 3284 (U.S. Oct. 13, 1992)	15
Walt Disney Prods., Inc. v. *Shannon*, 247 Ga. 402, 276 S.E.2d 580 (1981)	15
Walters v. *Seventeen Magazine*, 195 Cal. App.3d 1119, 241 Cal. Rptr. 101 (1987)	19, 25
Yuhas v. *Mudge*, 129 N.J. Super. 207, 322 A.2d 824 (1974)	20

TABLE OF AUTHORITIES—Continued

Miscellaneous

Page

L.F. Firenze, *Publishers' Liability for Commercial Advertisements: Testing the Limits of the First Amendment*, 23 Colum. J. of Law & Soc. Probs. 137 (1990) 21, 22

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PETITION FOR WRIT OF CERTIORARI

Petitioners Soldier of Fortune Magazine, Inc. and Omega Group, Ltd. respectfully pray that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on August 13, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 968 F.2d 1110 and is reprinted in the appendix hereto ("App.") at 1a. The opinion of the United States District Court for the Middle District of Alabama denying petitioners' post-trial motions is reported at 757 F. Supp. 1325 and is reprinted at App. 25a. The District Court's opinion denying petitioners' summary judgment motion is reported at 749 F. Supp. 1083 and is reprinted at App. 39a.

JURISDICTION

Jurisdiction in the District Court was based upon diversity of citizenship. The District Court entered judgment on the jury's verdict on December 7, 1990 and denied petitioners' post-trial motions on January 23, 1991. Petitioners filed a timely notice of appeal to the United States Court of Appeals for the Eleventh Circuit on February 13, 1991. The Eleventh Circuit affirmed the judgment on August 13, 1992. The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law * * * abridging the freedom of speech, or of the press."

STATEMENT OF THE CASE

A. Factual Background

Soldier of Fortune magazine ("SOF") was founded in 1975. It has a heavy military orientation and is directed primarily to Vietnam veterans, adventurers, and law enforcement officials. In fact, approximately 60,000 persons in law enforcement were reading the magazine during the period involved in this case.[1] Those seeking to hire Vietnam veterans used the magazine's personal service columns to advertise for private investigators, bodyguards, missing person tracers, oil rig guards, and the like,[2] and veterans themselves used the ads to seek similar

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[1] A 1982 study showed that 11% of SOF's readership was made up of state and federal law enforcement officials. Because of its large pass-on rate, the total readership reached 500,000-600,000 a month. Tr. 284, 379-380, 569-570.

[2] *E.g.*, Pl. Exs. 8 (p. 108), 46 (p. 93), 56 (p. 93), 79 (p. 95).

positions requiring the use of firearms—including armed couriers, executive protectors, and security counselors.[3]

The following personal service ad was among those run in the June 1985 issue:

> GUN FOR HIRE: 37 year old professional mercenary desires jobs. Vietnam Veteran. Discrete [4] and very private. Body guard, courier, and other special skills. All jobs considered. Phone (615) 436-9785 (days) or (615) 436-4335 (nights), or write: Rt. 2, Box 682 Village Loop Road, Gatlinburg, TN 37738. [Pl. Ex. 140 (p. 112).]

The individual who submitted the ad, Michael Savage, was a 37-year-old veteran who had served as a courier for General Westmoreland during the Vietnam war. He had received a "top secret" security clearance and, after leaving the Army, had worked as a security supervisor, a policeman, and a corrections officer in both federal and state facilities. At one point he considered opening a security department in an office building occupied primarily by lawyers. At the time he submitted the ad, he had no prior criminal record. The address in the ad was his own, and the two telephone numbers were his and his mother's.[5]

Savage's uncontradicted testimony was that he intended to procure only lawful jobs through the ad.[6]

Savage told those who telephoned him in response to the ad that he was looking for work as a bodyguard or

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[3] *E.g.*, Pl. Exs. 46 (pp. 93, 95), 56 (p. 91), 70 (p. 92), 79 (pp. 94, 95).

[4] The Court of Appeals inserted "sic" after the word "discrete," thereby implying that Savage had misspelled the word "discreet." App. 2a. The word, however, has two spellings and two meanings. Webster's Third International Dictionary, p. 647 (1976).

[5] Tr. 92-95, 113-115, 130-134, 171-173.

[6] Tr. 106, 108-110, 174-175.

a courier,[7] and he received some legitimate job inquiries. However, he also received a large number of calls asking him to commit crimes. His initial reaction to these latter calls was to laugh at them. Later, he began running a scam—agreeing to commit crimes, taking the money, but not following through. Finally, Savage began to commit crimes.[8]

Among those responding to the ad were several people who, for a period of many months before the ad ever ran, had been attempting to murder Richard Braun. Money had been paid for Braun's murder, and at least three separate attempts had been made on his life, including a car-bombing.[9] Finally, one of those involved in the murder plot saw Savage's ad and contacted him. Two months after the ad first ran, Savage joined the other conspirators and went to Braun's house. There, Shawn Trevor Doutre, who had nothing to do with the placement of the Savage ad, shot Braun to death and wounded his son. All of the participants, including Savage, were caught, convicted, and sent to prison.

B. Proceedings Below

Braun's wounded son and a second son who was not present at the time of the murder filed a diversity action in the United States District Court for the Middle District of Alabama against SOF for negligently publishing the Savage ad. SOF took the position before, during and after trial that since the ad was not an open invitation to crime,[10] the publisher was protected from liability by the

[7] Tr. 130-133, 167, 175. He accepted one job as a bodyguard. Tr. 132-133.

[8] Tr. 133-143, 146-149, 175. In January 1986, when SOF discovered that some of the personal ads were connected with criminal activity, the ads were cancelled, and they have never been renewed. Tr. 285, 585.

[9] Tr. 20-51, 115, 520-521.

[10] Among those who testified for the magazine were a state prosecutor and a former Defense Intelligence Agency official who had

First Amendment. The jury, however, was instructed that it could impose damages if it found that the Savage ad posed a substantial danger or unreasonable risk of harm to the public.[11] The jury returned a verdict for the plaintiffs of $2,375,000 in compensatory and $10,000,000 in punitive damages, the latter reduced by remittitur to $2,000,000. SOF appealed, raising both state law and First Amendment issues.[12]

The Eleventh Circuit, splitting two-to-one, upheld the judgment in favor of the plaintiffs. The court neither addressed the State's interest in allowing the imposition of damages nor examined the means chosen to achieve that interest. The court's conclusion was summarized in the following sentence:

> Based upon the foregoing authorities, we conclude that the First Amendment permits a state to impose upon a publisher liability for compensatory damages for negligently publishing a commercial advertisement where the ad on its face, and without the need for investigation, makes it apparent that there is a substantial danger of harm to the public. [App. 17a-18a (footnote deleted).]

The court thus devised a "modified" negligence standard which it thought avoided First Amendment problems. Under this revision, the court eliminated any duty to investigate ads, but held that liability could be imposed

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served under three Presidents. They had regularly read the SOF ads and had never suspected any criminal activity associated with them. Tr. 662-666, 676-679, 682. An FBI agent for ten years in Boulder, Colorado, SOF's home base, agreed; he had never received any complaints about the ads. Tr. 696-697, 699.

[11] Tr. 763-768.

[12] Because the compensatory damages alone were sufficient to put the magazine out of business, SOF did not separately challenge the imposition of punitive damages. The bond hearings in this case revealed insurance coverage limited to $190,000 and insufficient corporate funds to meet the remaining obligations under the judgment. The Court of Appeals implicitly recognized that the judgment could force the company out of business. App. 15a, 18a n.8.

if an ad on its face appeared to pose a clearly identifiable, unreasonable risk of harm to the public. On the basis of an independent review of the record, the court concluded that the First Amendment did not preclude recovery. The court distinguished the case of *Eimann* v. *Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990), in which the Fifth Circuit had thrown out a jury verdict against the same magazine for publishing a similar ad. The Eleventh Circuit felt that the jury instructions in the two cases differed.

The dissenter, Judge Eschbach, citing the First Amendment, found the language of the ad ambiguous. Moreover, on the basis of the jury instructions, he was unable to conclude that the jury had found the ad to be a clear solicitation of criminal activity. App. 24a.

REASONS FOR GRANTING THE WRIT

The judgment below, unless vacated by this Court, will put out of business an important national magazine that has been published for seventeen years. According to the Court of Appeals, the imposition of tort damages upon SOF was appropriate because the magazine had failed to detect a substantial danger of harm to the public in a personal service ad placed by a Vietnam veteran seeking employment. The issue for this Court is whether the standard of liability devised by the Court of Appeals is consistent with the First Amendment.

The standard adopted below is at odds with prior decisions of this Court and other federal and state courts. Under these rulings, restrictions on commercial speech may be upheld, at least in the absence of further judicial inquiry, only if the speech at issue is clearly illegal, misleading, or fraudulent on its face. The standard adopted by the Eleventh Circuit not only is inconsistent with this substantial body of precedent, but also opens the floodgates for unprecedented and crippling lawsuits against publishers. Because all that must be shown under the

Eleventh Circuit's broad standard is that an ad posed "a substantial danger of harm to the public," there is no longer even a requirement that the ad have any relationship to illegal conduct, much less that illegality be apparent from the face of the ad. The standard will limit core as well as commercial speech and will have a tremendous adverse impact, not only on SOF but throughout the publishing industry.

I. THE DECISION BELOW IS INCONSISTENT WITH PRIOR DECISIONS OF THIS AND OTHER COURTS, WHICH HAVE ALLOWED COMMERCIAL SPEECH TO BE ABRIDGED ONLY IF IT IS CLEARLY ILLEGAL, MISLEADING OR FRAUDULENT ON ITS FACE

A. Prior Decisions Generally

This Court has long held that even speech that does nothing more than propose a commercial transaction is protected by the First Amendment. *See, e.g., Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976). Because a particular consumer's interest in such speech "may be as keen, if not keener by far, than his interest in the day's most urgent political debate," *id.* at 763, commercial speech may be restricted only under limited circumstances. Ordinarily, such speech may be abridged only if "the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest." *Posadas de Puerto Rico Assocs.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986) (*citing Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980)).

An abridgment of commercial speech may be upheld in the absence of such a judicial inquiry only when it solicits unlawful activity or is misleading or fraudulent.

Posadas, 478 U.S. at 340.[13] In most cases before this Court, that initial hurdle has been jumped quickly because the commercial speech in question clearly related to lawful activity and unquestionably was neither misleading nor fraudulent. *See, e.g., Central Hudson*, 447 U.S. at 563-564. However, in those few cases in which this preliminary issue had to be considered, the Court has indicated that commercial speech is entirely unprotected (*i.e.*, there is no need for further judicial inquiry) only if it is clearly illegal, misleading, or fraudulent on its face.

For example, in *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973), this Court upheld a local ordinance prohibiting the publication of "help-wanted" ads in sex-designated columns because such a format was unambiguously illegal on its face. Indeed, the Court compared the ads, in the context in which they were displayed, to "want ad[s] proposing a sale of narcotics or soliciting prostitutes." *Id.* at 388. Likewise, in *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 375 n.31 (1977), the Court held that ads for legal services could not be deemed fraudulent for First Amendment purposes because there was no "inevitable relationship between [that] advertising and dishonesty."

The lower courts also have understood that restrictions on commercial speech may be upheld, without further inquiry, only when the speech at issue is clearly unlawful, misleading, or fraudulent on its face. Thus, in *Dunagin* v. *City of Oxford*, 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984), the Fifth Circuit invalidated Mississippi's restrictions on liquor advertising even though alcohol was illegal in much of the State. The court held that such advertising was constitutionally protected because alcohol was allowed in some Mississippi

[13] *See also Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 68-69 (1983); *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 700-702 (1977).

counties and the ads in question were not unambiguously proposing illegal activity. 718 F.2d at 743. Importantly, the court noted that "[t]he commercial speech doctrine would disappear if its protection ceased whenever the advertised product might be used illegally." *Id.*[14]

B. The *Eimann* Decision

In the parallel case of *Eimann* v. *Soldier of Fortune Magazine, Inc.*, *supra*, the Fifth Circuit construed the First Amendment in a manner consistent with *Pittsburgh Press* and *Dunagin*. There, a Vietnam veteran ran the following ad in SOF:

> EX-MARINES—67-69, 'Nams Vets, Ex-DI, weapons specialist-jungle warfare, pilot, M.E., high risk assignments, U.S. or overseas. (404) 991-2684. [880 F.2d at 831.]

The veteran, after being contacted by someone soliciting a murder, eventually committed that murder. *Id.* at 832. The jury imposed damages upon the magazine, but the Fifth Circuit held as a matter of law that SOF was not liable. *Id.* at 838.

While the Fifth Circuit did not need to reach the constitutional issue because damages should not have been awarded under Texas law, *id.* at 834, it is clear that First Amendment concerns informed and underlay the court's decision. The Fifth Circuit explained in great detail why the ad at issue there, which differed in no sig-

[14] It is difficult enough even under the clearly-illegal-on-its-face standard to determine which ads are acceptable and which are not. For example, ads are currently running in non-underground, traditional magazines for drivers' licenses by mail ("any name, any state"), "instant divorces" obtained "over a long weekend," radar detectors, and steroids. *See American Survival Guide*, Vol. 14, No. 10, p. 70 (Oct. 1992); *Washingtonian*, p. 170 (Sept. 1992); *Popular Mechanics*, pp. 7, 113, & following p. 64 (Oct. 1992); *Guns & Ammo*, p. 17 (Oct. 1992); *Car & Driver*, pp. 11, 79, 109, 142, 173, & following p. 108 (Oct. 1992); *Road & Track*, pp. 9, 71, 123, 135 (Sept. 1992); *Ironman*, p. 186 (Oct. 1992).

nificant respects from the Savage ad, was entitled to First Amendment protection. *Id.* at 836-837.

In its lengthy constitutional discussion, the *Eimann* court acknowledged that "the jury [had] found that [the] ad 'relate[d] to' illegal activity." *Id.* at 837. Nevertheless, relying upon this Court's decision in *Pittsburgh Press* and its own decision in *Dunagin*, the Fifth Circuit stated that "the possibility of illegal results d[id] not necessarily strip [the] ad of its commercial speech protection." *Id.* The court explained that a constitutional standard permitting the imposition of liability whenever an advertisement " 'could reasonably be interpreted as an offer to engage in illegal activity' " would impose too heavy a burden on commercial speech. *Id.* The court also noted that "the publication's editorial content would surely feel the economic crunch from loss of revenue that would result if publishers were required to reject all ambiguous advertisements." *Id.*

The entire premise of *Eimann* was that an ad must constitute an open, unambiguous invitation to a crime before the publisher can be held liable. The Eleventh Circuit, in the decision below, has rejected that standard for one that makes publishers liable even when ads are reasonably subject to various interpretations, including perfectly innocuous ones. What the jury *found* in *Eimann*, which the Fifth Circuit rejected, would have been more than enough to sustain liability under the Eleventh Circuit test. These two conflicting interpretations of the law must be resolved.

C. The Savage Ad Was Not Clearly Illegal on Its Face and Thus the Decision Below Is Inconsistent With Prior Decisions of This and Other Courts

The Savage ad was not unambiguously illegal on its face, as were the sex-designated "help wanted" ads in *Pittsburgh Press*. Instead, like the liquor ads in *Dunagin* and the virtually indistinguishable ad at issue in *Eimann*,

the Savage ad was merely susceptible of being interpreted as a proposal to engage in illegal activity. The trial judge in this case, in denying a motion for summary judgment, conceded that the Savage ad was ambiguous,[15] and all three Court of Appeals judges implicitly or explicitly agreed.[16]

The Eleventh Circuit, after independently reviewing the record as required by the First Amendment, *see Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), should have found that the Savage ad was ambiguous and that the ambiguity precluded liability. It is certain that if Michael Savage had placed the following ad in SOF, no one would have assumed he was soliciting crime:

> I am a Vietnam veteran, a mercenary type, in need of a job. I know how to handle guns, and I would like to hire out as a discrete and private bodyguard, courier, or other similar position. I am hard up, so I will at least listen to any offer. Here are my telephone numbers and my address where an employer can reach me.

Yet the ad he did place was merely another, short-hand way of expressing the language above. He in effect so testified.

"Gun for hire," like "hired gun," is a well-recognized term or "handle" used to identify someone familiar with weapons. Armored car and motorcade guards, on-site and plant security personnel, private detectives, law en-

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[15] In one opinion, the district judge repeatedly referred to the ad in terms of "ambiguity," "suggests," "reasonably construed," "implies," "interpreted," "even though couched in terms not explicitly offering criminal services," and "does not contain an express offer to murder." App. 41a & n.1, 42a, 44a.

[16] The dissenter so stated. App. 24a. The majority conceded that the ad was "couched in terms not explicitly offering criminal services" but contended that "the implication" was that Savage "would consider" illegal jobs. App. 21a.

forcement personnel, bank and retail guards, big game guides, bail enforcement agents, firearm instructors, customs officials, and "range detectives" are among those individuals who may legitimately be required to carry and use firearms as part of their employment. Any of them might advertise as a "gun for hire." Thus, it is not surprising that the Fifth Circuit in *Eimann* equated the ad at issue there with a "gun for hire" ad, and yet ruled out liability. 880 F.2d at 833.

There also is nothing nefarious about specifying that the advertiser is "[d]iscrete and very private," since a sensitivity to privacy might be a primary job requirement in the eyes of celebrities and others seeking protection. And "[a]ll jobs considered" is not a promise to take any job, but only a statement that every offer will at least be considered—a common technique in advertising.

The court simply ignored the fact that Vietnam veterans regularly used the magazine to advertise one of the few skills many of them had learned in the military—the use of firearms—in an attempt to obtain jobs in which such skills were not only legal but required. The fact is that if a Vietnam veteran with knowledge of firearms was attempting to obtain a bodyguard or courier position with a movie star, politician, businessman or other high-profile personality, it is difficult to know how he would advertise his skills other than the way Savage did.

In assessing the Savage ad, the Eleventh Circuit also wholly ignored the kind of magazine in which the ad appeared. SOF has a heavy military orientation and during the period in question was directed primarily to a market consisting of Vietnam veterans, adventurers, and approximately 60,000 law enforcement officials. Yet the court below tacitly assumed that an advertiser would

openly place—and that SOF *knew* he would place—an invitation to crime in such a publication.[17]

In sum, an independent review of the record compels the conclusion that the Savage ad was not clearly illegal on its face. Therefore, the Eleventh Circuit's decision simply cannot be squared with *Pittsburgh Press*, *Dunagin*, and *Eimann*.

II. THE DECISION BELOW ADOPTS A STANDARD THAT WILL OPEN THE FLOODGATES TO CRIPPLING AND UNPRECEDENTED LAWSUITS AGAINST PUBLISHERS

The Eleventh Circuit did much more than simply blur the line between those ads that clearly solicit criminal activity and those that are ambiguous. Instead, the court adopted an entirely new rule that premises liability on whether it is "apparent" that the ad on its face poses "a substantial danger of harm to the public."

The court's failure to distinguish between an ad that solicits crime and one that merely poses a danger of harm was not inadvertent. Over and over the court stated and restated the "danger of harm" theme.[18] The court had to rest on this thesis because the jury had been instructed to impose liability *not* if the ad was a solicitation of

[17] It is ironic that the Eleventh Circuit distinguished *Eimann* in part because the jury there was allowed to consider "context," App. 11a-12a, whereas the jury here was forbidden from looking at context. The fact is that a consideration of context in this case would have helped SOF demonstrate that the Savage ad was textually innocent and that an invitation to crime would never have been deliberately placed or accepted in the magazine.

[18] *E.g.*, "unreasonable risk of harm" (App. 8a, 19a n.9); "clearly identifiable unreasonable risk of harm" (App. 8a, 9a, 11a & n.4, 12a, 18a, 19a n.9, 20a, 22a); "clearly identifiable unreasonable risk" (App. 10a n.3, 11a, 15a, 21a, 22a n.12); "substantial danger of harm" (App. 16a, 17a-18a (twice), 19a & n.9, 21a); "substantial danger" (App. 22a); "clear risk of substantial danger" (App. 22a); "risk of harm" (App. 19a).

crime, but rather if the ad posed an "unreasonable risk."[19] Therefore, the Court of Appeals went out of its way to reject SOF's argument—that a publisher is liable only if an ad "openly solicits criminal activity."[20]

"Risk" is a fluid concept that introduces a new element of ambiguity into publishing. This has already been recognized in a series of core speech cases in which persons have been killed or seriously injured. The courts have refused, based on First Amendment considerations, even to allow these actions to go to trial, despite allegations of advance knowledge of potential harm by the perpetrators.[21] For the same reason, the risk-of-harm standard

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[19] Tr. 763-768.

[20] App. 8a, 12a. The court below did *not* rest its opinion in any way upon the District Court's references in its jury instructions to a possible "clear and present danger." *See* App. 11a n.4. Nor could it. The District Court used this phrase three times, and two out of three references were in the alternative—*either* a clear and present danger *or* an unreasonable significant risk. Tr. 764, 766, 767. Since this was a general verdict, we have no way of knowing upon which theory the jury based its judgment. *See City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1356 (1991); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284 (1964).

The Court of Appeals also noted evidence at trial relating to SOF's alleged prior notice of other crimes. App. 3a-4a & n.2. This evidence was fully rebutted, and the Court of Appeals notably did *not* rely upon it in its decision.

[21] *See DeFilippo* v. *National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982) (even though TV personality negligently and with prior recognition of its dangers participated in hanging act with stuntman, summary judgment for broadcaster based on First Amendment); *Bill* v. *Superior Court*, 137 Cal. App.3d 1002, 187 Cal. Rptr. 625 (1982) (even though movie producer recognized danger in advance that his violent movie would attract those prone to violence, summary judgment for producer based on First Amendment); *Herceg* v. *Hustler Magazine*, 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (even though magazine described autoerotic asphyxia in glowing terms and knew 1000 teenagers died from it annually, summary judgment granted magazine based on First Amendment); *McCollum* v. *CBS Inc.*, 202 Cal. App.3d 989, 249 Cal. Rptr. 187, 192-194 (1988) (even though record directed the

used by the Eleventh Circuit is unworkable in the commercial speech area, as illustrated by ads currently in use. For example:

—Many newspapers and magazines contain personal ads in which persons seek relationships with others. In the November 1992 issue of the *Washingtonian* magazine there were just under 400 personal ads by men and women in search of romance and companionship. Included were 21 ads from married persons seeking "intimate" or "discreet" relationships, "sensuous encounters", and the like.[22] Under the ruling below, publications like the *Washingtonian* could be held liable for the harm caused by husbands or wives who discovered trysts, because there is clearly and unmistakably a danger from the face of these ads that serious harm may result from them.[23]

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imminent suicide of listeners and record company knew such a result would likely ensue, dismissal entered for record company based on First Amendment); *Walt Disney Prods., Inc.* v. *Shannon*, 247 Ga. 402, 276 S.E.2d 580, 581, 583 (1981) (broadcast reproduced sound of tire coming off by rotating BB pellet inside balloon; plaintiff replicated act and was partially blinded; despite allegation that program "constituted an invitation * * * to do something posing a foreseeable risk of injury to children of tender years," summary judgment granted to broadcaster based on First Amendment); *Waller* v. *Osbourne*, 763 F. Supp. 1144 (M.D. Ga. 1991) (despite allegations of deliberate incitement to suicide by record producer, summary judgment granted to defendants on First Amendment grounds), *aff'd per curiam*, 958 F.2d 1084 (11th Cir.), *cert. denied*, 61 U.S.L.W. 3284 (U.S. Oct. 13, 1992); *see also Olivia N.* v. *National Broadcasting Co.*, 126 Cal. App.3d 488, 178 Cal. Rptr. 888 (1981), *cert. denied*, 458 U.S. 1108 (1982).

[22] *Washingtonian*, pp. 178-190 (Sept. 1992). Similar ads appear in such periodicals as the *New York Review of Books*. *See, e.g.*, issue of Sept. 24, 1992, pp. 70-71. Other periodicals that run personal ads include *Detroit Monthly*, *New York Magazine* and the *City Paper*, Washington, D.C.

[23] For an example of a personal ad in the *Washingtonian* that led first to dates and then to murder, see *People Magazine*, pp. 62-68 (Sept. 7, 1992).

—There is a virtual battle currently under way in the advertising pages of the nation's magazines over which car company's vehicle can accelerate from a standing position to 60 miles per hour in the shortest period of time. Subaru claims "just over 7 seconds" and a "top speed of 140 miles an hour."[24] The Corrado SLC VR6 says it can do the same in 6.8 seconds and reach the same speed, "140 mph top-end."[25] The Toyota MR2 Turbo not only "clocks in at 6.2 seconds" but compares itself favorably with the Ferrari Mondial's 6.6 seconds.[26] And, finally, the Mazda RX-7 claims the record: 60 miles per hour in "4.9 seconds."[27] Someone injured attempting to test or duplicate these claims could reasonably allege that the publisher must have known from the face of the ads and without investigation that accelerating to 60 mph in from 4.9 to 7 seconds posed substantial risks of harm, and that driving 140 mph is neither legal nor safe on any public highway in the country.

—There is no evidence in the record as to the circumstances under which the fatal gun was purchased. But if it was purchased through or as the result of one of the many gun ads that regularly run in the nation's magazines, the Eleventh Circuit's standard would permit a suit by these same plaintiffs against the publishers of the magazine in question, since any ad for a gun shows on its face that it poses a threat to the public. Yet until now, even the *manufacturers* of such guns—who are responsible for devising and placing the ads—have not been held liable to gunshot victims, "despite the real possibility that such products can be used for criminal purposes." *Eimann*, 880 F.2d at 837; *see, e.g., Perkins*

[24] *Car & Driver*, pp. 136-137 (Oct. 1992).

[25] *Road & Track*, p. 94 (Sept. 1992); *Car & Driver*, pp. 156-157 (Oct. 1992).

[26] *Road & Track*, pp. 148-149 (Sept. 1992).

[27] *Car & Driver*, pp. 68-69 (Oct. 1992); *Road & Track*, p. 21 (Sept. 1992).

v. *F.I.E. Corp.*, 762 F.2d 1250, 1275 (5th Cir. 1985); *Armijo* v. *Ex Cam, Inc.*, 656 F. Supp. 771, 775 (D.N.M. 1987), *aff'd*, 843 F.2d 406 (10th Cir. 1988).

—Assuming that lawsuits will still lie in some form for the advertisement of cancer-causing cigarette smoking,[28] these ads are perhaps the most obvious examples of those posing substantial danger to the public, since the ads state *on their face*, in a warning by the Surgeon General, that the cigarettes being advertised result in serious health risks.[29]

—Only three months ago, a young woman carrying a book called "Anarchist's Cookbook" broke into the home of the Chancellor of the University of California (Berkeley) and attacked a policeman with a machete.[30] This book is regularly advertised in publications now on the newsstands.[31] These publications, chargeable with knowledge that the ads on their face pose a substantial danger of harm, could be liable to those who are harmed.

In addition, there are ads now running for "Deputy sheriff" and "police" badges,[32] assault weapons,[33] in-

[28] *Cf. Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

[29] Even an ad for the Virginia Slims Tennis Championships, which carries the Surgeon General's warning, would be subject to suit under the Eleventh Circuit ruling. *See, e.g., New York Magazine*, p. 53 (Sept. 21, 1992). Consumer advertising in magazines for cigarettes, tobacco and accessories alone exceeded $264 million in 1991. *The Magazine Handbook 1992-1993*, p. 17.

[30] *N.Y. Times*, p. A-14 (Aug. 26, 1992).

[31] *E.g., The Nation*, p. 304 (Sept. 21, 1992); *Mother Jones*, p. 69 (Sept./Oct. 1992); *American Survival Guide*, Vol. 14, No. 10, p. 33 (Oct. 1992).

[32] *Official Detective*, pp. 65, 73 (Dec. 1992); *Guns Magazine*, pp. 9, 80 (Oct. 1992). For the story of an alleged rapist "who scoured want ads" for four years and built a personal trove of "police-style paraphernalia," *see The Washington Post*, p. D1 (Oct. 2, 1992).

[33] *Rifle Shotgun Annual*, Vol. 10, No. 5, inside back cover; *American Survival Guide*, Vol. 14, No. 10, pp. 21, 73 (Oct. 1992).

stantly attachable and detachable automobile running boards,[34] stun guns emitting from 50,000 to 200,000 volts,[35] and perfectly duplicated counterfeit weapons.[36] There also are ads seeking to teach the reader how to be a locksmith "in a high-profit business of your own"[37] and offering $4 incentives for readers to find out why certain ammunition is "the best-kept secret in law enforcement."[38] One ad, echoing part of the Savage ad, states: "If it's got to be discrete—It's got to be North American Arms," with a picture of a .22 magnum pistol.[39] All of these ads are potentially very dangerous, depending upon the use to which the items being advertised will be put.[40]

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[34] *Sports Afield*, p. 17 (Sept. 1992).

[35] *Guns Magazine*, p. 105 (Oct. 1992); *Guns & Ammo*, p. 110 (Oct. 1992); *American Survival Guide*, Vol. 14, No. 10, pp. 3, 71 (Oct. 1992).

[36] *Guns & Ammo*, p. 109 (Oct. 1992).

[37] *Guns & Ammo*, p. 85 (Oct. 1992).

[38] *Sports Afield*, p. 27 (Sept. 1992); *Guns Magazine*, p. 37 (Oct. 1992); *Guns & Ammo*, p. 75 (Oct. 1992).

[39] *Guns & Ammo*, p. 23 (Oct. 1992).

[40] There is no reason to think that the liability of publishers will be limited by the state law concept of "proximate cause." In this case, the ad did not trigger, elicit, impel, precipitate or incite an event that otherwise would not have occurred. Two men had been bent on killing Braun, and had made three serious attempts on his life, before the ad was published. The appearance of the ad was therefore a coincidental factor in a long string of events that put two people in contact with a third, but did not *cause* the harm that occurred. Nevertheless, both the District Court and the Court of Appeals rejected "proximate cause" arguments advanced by SOF. *Cf. Sakon* v. *Pepsico, Inc.*, 553 So.2d 163, 164, 166 (Fla. 1989) (after considering First Amendment, court found no proximate cause despite allegations that advertiser broadcast ad depicting dangerous activity in manner likely to induce young viewer to imitate the activity).

In the real world, the Court of Appeals' "modified" standard is simply incapable of application. For example, the October 1992 issue of the *American Survival Guide*, a magazine for campers and hunters, contained a personal service ad by a "male * * * seeking employment as a member of your security team" who could "provide own weapons" and who guaranteed that he was "[v]ery discreet and reliable" (p. 68). And the following ad appeared in *The Denver Post*, at 70, col. 3 (Feb. 7, 1989): "WILL GO anywhere, do most anything. Resp., capable, exec. background. Discreet. Call T. Kent. 841-1026." Would these ads be acceptable or unacceptable to a reasonably prudent publisher [11] attempting to operate under the Eleventh Circuit standard, and for what reason?

Certainly recognition of a substantial danger of harm will not suffice to answer this query for the publisher—at least under prior case law. For example, a plaintiff sued a magazine after suffering toxic shock from using tampons advertised in the magazine. She alleged negligence because the magazine was fully aware of the danger both from its own articles and from knowledge that similar tampons had been removed from the market. The appellate court nevertheless approved a dismissal of the suit, prior to trial, on First Amendment grounds. *Walters* v. *Seventeen Magazine*, 195 Cal. App.3d 1119, 241 Cal. Rptr. 101 (1987).

In another case, plaintiffs injured by fireworks sued the magazine publishing the ad that led them to buy the fireworks. Even though fireworks were illegal in New Jersey, and the ad showed on its face that the fireworks

[11] Although the District Court and Court of Appeals repeatedly referred to how a "reasonably prudent" publisher would view the Savage ad, App. 9a, 10a n.3, 11a-12a, 15a, 17a, 21a, 23a, there was not an iota of evidence from publishers or other experts as to how the ad should be read. The only testimony remotely relevant was that of SOF personnel, all of whom testified that they read the ad as seeking legal employment.

in question were for sale from that State, the appellate court affirmed a dismissal of the complaint, prior to trial, because of the hardship any other ruling would work on publishers. *Yuhas* v. *Mudge*, 129 N.J. Super. 207, 322 A.2d 824 (1974).[42]

The examples above all demonstrate that the Court of Appeals' opinion in this case creates a whole new world for plaintiffs' attorneys. At a time when the courts are already over-burdened, a new cottage industry in the law will almost certainly develop: suing the electronic[43] and print media for publishing ads that juries may view, in hindsight, as having presented on their face substantial or unreasonable risks. The Court of Appeals implicitly recognized, by fashioning a new rule based on First Amendment concerns, that it was sailing in uncharted waters.[44] We respectfully submit that if any such stand-

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[42] *See also Lewis* v. *Columbia Pictures Indus., Inc.*, 20 Med. L. Rptr. 1807, 1808 (Cal. Super. Ct. 1992) (demurrer sustained on First Amendment grounds to negligence suit despite allegation that movie ads were designed in a way "to create an unreasonable risk of harm to persons attending the ['Boyz 'N The Hood'] movie").

[43] The Eleventh Circuit ruling does not confine its reach to the print media. Today, "electronic bulletin boards" disseminate ads and other messages of third parties to their "readers." In addition, long distance telephone companies providing 900 number lines to customers using their interstate telecommunications networks may have notice of the contents of what is being offered to the public by the customers' 900 number programs. These and other technologically advanced means of communicating solicitations of products and services may well be exposed to the broad reaches of the Eleventh Circuit ruling.

[44] The court below felt that it was giving added protection to publishers through a "modified" negligence standard that imposes "no legal duty to investigate" their ads. App. 15a-17a. But this "modified" standard actually worked to deny SOF protection it might otherwise have; it stood SOF's constitutional protection on its head. For if SOF had investigated Savage's ad, it would have found that (a) the ad was placed by a former policeman with a top secret security clearance as a courier during the Vietnam war and with no prior criminal record; (b) the advertiser really was seeking

ard of care is to be imposed on publishers, it should come from this Court. This is not an area that should await the ebb and flow of litigation.

III. THE BROAD STANDARD ADOPTED BY THE ELEVENTH CIRCUIT WILL LIMIT CORE SPEECH

The impact of the ruling below is not restricted to commercial speech, for a number of reasons.

1. This is not the normal commercial speech case. This Court has pointed out that one of the reasons commercial speech may be regulated is that "commercial speakers have extensive knowledge of both the market and their products, [and] * * * are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity." *Central Hudson*, 447 U.S. at 564 n.6.[45] This observation, however, does not apply to a *publisher* of commercial speech, such as SOF. "Publishers do not tout their own products or services, but rather present information regarding the offerings of third parties. * * * Furthermore, publishers do not have easy access to the facts pertaining to advertisements nor do they have the resources to screen each and every advertisement."[46] Thus, as this Court pointed out in *Bigelow* v. *Virginia*, 421 U.S. 809, 828 (1975), the fact that the plaintiffs sued the publisher rather than the advertiser raises "more serious First Amendment overtones." *See also United States* v. *Goldstein*, 431 F. Supp. 974, 979 (D. Kan. 1976).

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a legitimate, bodyguard-type job; and (c) the facts set forth in the ad, including the address, the two telephone numbers and the description of the advertiser, were bona fide.

[45] *See also Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. at 771-772 n.24.

[46] L.F. Firenze, *Publishers' Liability for Commercial Advertisements: Testing the Limits of the First Amendment*, 23 Colum. J. of Law & Soc. Probs. 137, 149 (1990).

2. A publisher's choice as to whether or not to run an ad "is an exercise of editorial discretion similar to a publisher's choice of layout or endorsement of a political issue"—thus invoking both the right to free speech and the right to a free press.[47] In the same way that publishers cannot be forced to run ads,[48] so too their choice of the ads they do run is a function of the editorial process and should be constitutionally protected unless some narrow exception is specifically applicable. In SOF's case, running ads by Vietnam veterans was intimately tied to the very purpose of the magazine, inextricable from its editorial tone and message.[49]

3. Not only will the ruling below eliminate some core speech altogether—by eliminating this magazine and other publications that inevitably will be hit with huge judgments in the future—but all publishers will have to undertake the task of attempted compliance. This will require publishers not only to bear the costs of screening all ads but to reject many ads that might appear, in hindsight, to have imposed a substantial risk. The rejection of such ads will, in turn, affect revenues, with a concomitant impact upon core speech.[50]

The adverse effect on core speech by the ruling below will be heightened because we are not dealing here with a narrowly-tailored statute that gives the publisher prior

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[47] Firenze, 23 Colum. J. of Law & Soc. Probs. at 139.

[48] *Mississippi Gay Alliance* v. *Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977); *Cf. Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974); *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971).

[49] Ads "may be every bit as reflective of the quality of [the publisher] as its editorial page." *Adult Film Ass'n* v. *Times Mirror Co.*, 3 Media L. Rptr. 2292, 2293 (Cal. Super. Ct. 1978), *aff'd*, 97 Cal. App. 3d 77, 158 Cal. Rptr. 547 (1979); *see also Ad World, Inc.* v. *Doylestown*, 672 F.2d 1136, 1140 (3d Cir.), *cert. denied*, 456 U.S. 975 (1982).

[50] Even the Court of Appeals recognized that there was a greater risk in this case than in the ordinary commercial speech case that speech would be impermissibly chilled. App. 14a.

detailed knowledge about what can be printed without risking a criminal charge or civil damages. Instead, publishers are confronted with "a common law concept of the most general and undefined nature" [51]—a serious risk of harm—and the result is that they will reject much protected speech so as to avoid being held liable. It is inconceivable that SOF could have been criminally prosecuted for publishing the Savage ad. Yet the irony is that the devastating damages awarded here will be as fully "inhibiting" to publishers that depend upon advertising as would "the fear of prosecution under a criminal statute." *New York Times Co.* v. *Sullivan*, 376 U.S. at 277.

4. The vague standard adopted by the Eleventh Circuit almost certainly will be used to penalize unpopular core speech. When a plaintiff suggested to this Court that a similarly vague standard could separate outrageous caricature from political cartoons, the Court responded as follows:

> If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard * * *. [The suggested standard] has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. [*Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 55 (1988).]

And so here, allowing a jury to find a "substantial danger" or "unreasonable risk" of harm in a "gun for hire" ad in a magazine as controversial as SOF invites subjective conclusions based on a variety of feelings about guns, Vietnam veterans, and conservative causes. Other newspapers and magazines promoting unpopular causes unquestionably will need to fear that they too will be held liable for their political views.

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[51] *Cantwell* v. *Connecticut*, 310 U.S. 296, 307-308 (1940).

In sum, even if the speech involved here were purely commercial—which was not the case—the Court of Appeals applied a standard so broad that it necessarily will adversely trench upon core speech.

IV. IN PRACTICAL TERMS, THE BROAD STANDARD ADOPTED BY THE COURT OF APPEALS WILL HAVE A SUBSTANTIAL ADVERSE IMPACT UPON THE PRINT AND ELECTRONIC MEDIA

The practical adverse impact of the ruling below upon newspaper and magazine publishers, as well as upon the electronic media, cannot be overstated. First, there is the obvious and direct effect on classified ads, which "underwrite in part the cost of publication." *Vaill* v. *Oneida Dispatch Corp.*, 129 Misc. 2d 477, 493 N.Y.S. 2d 414, 416 (Sup. Ct. 1985). With the exception of Sunday editions, classified ads appear in print in newspapers "within a matter of hours after their submission for publication." *Id.* Requiring publishers to make the kind of judgments imposed by the Eleventh Circuit—deciding, for example, that the ad of a "weapons specialist" seeking "high risk assignments" can be published but that one by a "gun for hire" with "bodyguard, courier and other special skills" cannot—not only would be inordinately expensive, but would result in many legitimate ads being turned down.

Moreover, the effect of this decision obviously will not be confined to classified ads. The Eleventh Circuit did not so limit its holding, and as the preceding discussion makes clear, many ads touting well-known products nationally might be viewed in hindsight as having posed a substantial risk of harm. Thus, newspapers and magazines, which rely for their very existence upon the more than $37 billion in advertising revenues they receive annually,[52] inevitably will be forced to screen their advertising and reject ads they deem borderline, ambiguous,

[52] Newspaper Ass'n of America, *Facts About Newspapers '92*, p. 10; *The Magazine Handbook 1992-1993*, pp. 3, 4, 15.

questionable or obscure. Even television and radio stations, which also depend upon advertising revenues,[53] are subject to liability under the open-ended standard adopted by the Court of Appeals and will be forced to adjust their policies accordingly.

It was precisely this type of problem that led a California court to decry an attempt to force publishers to investigate the safety of ads: the enormous cost of monitoring staffs, "along with skyrocketing insurance rates, would deter many magazines from accepting advertising * * *. Others would * * * raise their prices beyond the reach of the average reader. Still others would be wiped out by tort judgments, never to revive." *Walters* v. *Seventeen Magazine*, 195 Cal. App.3d at 1122, 241 Cal. Rptr. at 103. That language is particularly appropriate, and even prophetic, in connection with the present case.

The jury in *Eimann* also thought, in hindsight, that there had been a substantial danger of harm, or worse, but the Fifth Circuit nevertheless reversed. In the instant case, two judges agreed with the jury, and one did not. It is thus clear that while the legalistic phrase "substantial danger of harm" may satisfy a judicial longing to articulate a test or standard, it does *not* inform the print and electronic media how they are supposed to operate in the chaotic world of publishing.

The "pall of fear and timidity" that this Court recognized in *New York Times Co.* v. *Sullivan*, 376 U.S. at 278, as the by-product of civil damages will descend upon all media that publish ads. In the same way that the falsehoods in the *New York Times* ad at issue in the *Sullivan* case did not prevent this Court from shielding the publisher from liability, so too there should be some leeway here—room even for mistakes—because a loose negligence standard simply will not protect a free press.

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[53] In 1991, television stations received advertising revenues of $27.4 billion, and radio stations, $8.4 billion. Newspaper Ass'n of America, *Facts About Newspapers '92*, p. 10.

Unless the publisher can clearly discern the illegal intent of the advertiser, liability should not attach.[54]

CONCLUSION

Although the evidence was uncontroverted that Savage —a former police officer with no criminal record—did not intend his ad as a solicitation to crime when he placed it, the ad was a connecting link in a series of events that eventually ended in a murder by a third party. Must SOF now suffer fatal damages because of its failure to read the ad differently than its author intended it?

The personal ads have long since disappeared from SOF. They were cancelled years before this suit was filed. But the standard of liability established by the Eleventh Circuit lives on and will permeate the plaintiffs' and defense bars for years to come, chilling the acceptance and publication of a wide variety of advertisements. This Court should grant certiorari and rule that only when a publisher prints an ad that manifestly and on its face constitutes an invitation to a crime may the publisher be held liable in civil damages for harm related to that ad.

Respectfully submitted,

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[54] *See News & Sun-Sentinel Co.* v. *Board of County Comm'rs*, 693 F. Supp. 1066, 1071 (S.D. Fla. 1987) (distinguishing *Pittsburgh Press*).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-7130

MICHAEL F. BRAUN,
Plaintiff-Appellee,

v.

SOLDIER OF FORTUNE MAGAZINE, INC.
and OMEGA GROUP, LTD.,
Defendants-Appellants.

MICHAEL F. BRAUN and IAN BRAUN,
Plaintiffs-Appellees,

v.

SOLDIER OF FORTUNE MAGAZINE, INC.
and OMEGA GROUP, LTD.,
Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Alabama

Aug. 13, 1992

Before ANDERSON and DUBINA, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

ANDERSON, Circuit Judge:

Soldier of Fortune Magazine, Inc., and its parent, Omega Group, Ltd., (hereinafter collectively referred to as "SOF") appeal a $4,375,000 jury verdict against them in a consolidated tort action brought by Michael and Ian Braun, the sons of a murder victim. The jury found that SOF acted with negligence and malice in publishing a personal service advertisement through which plaintiffs' father's business partner hired an assassin to kill him. We affirm the judgment entered on the jury's verdict.

I. FACTS

In January 1985, Michael Savage submitted a personal service advertisement to SOF. After several conversations between Savage and SOF's advertising manager, Joan Steel, the following advertisement ran in the June 1985 through March 1986 issues of SOF:

> **GUN FOR HIRE:** 37 year old professional mercenary desires jobs. Vietnam Veteran. Discrete [sic] and very private. Body guard, courier, and other special skills. All jobs considered. Phone (615) 436-9785 (days) or (615) 436-4335 (nights), or write: Rt. 2, Box 682 Village Loop Road, Gatlinburg, TN 37738.

Savage testified that, when he placed the ad, he had no intention of obtaining anything but legitimate jobs. Nonetheless, Savage stated that the overwhelming majority of the 30 to 40 phone calls a week he received in response to his ad sought his participation in criminal activity such as murder, assault, and kidnapping. The

* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

ad also generated at least one legitimate job as a bodyguard, which Savage accepted.

In late 1984 or early 1985, Bruce Gastwirth began seeking to murder his business partner, Richard Braun. Gastwirth enlisted the aid of another business associate, John Horton Moore, and together they arranged for at least three attempts on Braun's life, all of which were unsuccessful. Responding to Savage's SOF ad, Gastwirth and Moore contacted him in August 1985 to discuss plans to murder Braun.

On August 26, 1985, Savage, Moore, and another individual, Sean Trevor Doutre, went to Braun's suburban Atlanta home. As Braun and his sixteen year-old son Michael were driving down the driveway, Doutre stepped in front of Braun's car and fired several shots into the car with a MAC 11 automatic pistol. The shots hit Michael in the thigh and wounded Braun as well. Braun managed to roll out of the car, but Doutre walked over to Braun and killed him by firing two more shots into the back of his head as Braun lay on the ground.

II. PROCEEDINGS BELOW

On March 31, 1988, appellees Michael and Ian Braun filed this diversity action against appellants in the United States District Court for the Middle District of Alabama, seeking damages for the wrongful death of their father. Michael Braun also filed a separate action seeking recovery for the personal injuries he received at the time of his father's death. The district court consolidated these related matters.

Trial began on December 3, 1990. Appellees contended that, under Georgia law, SOF was liable for their injuries because SOF negligently published a personal service advertisement which created an unreasonable risk of the solicitation and commission of violent criminal activity, including murder. To show that SOF knew of the likeli-

hood that criminal activity would result from placing an ad like Savage's, appellees introduced evidence of newspaper and magazine articles published prior to Braun's murder which described links between SOF personal service ads and a number of criminal convictions including murder, kidnapping, assault, extortion, and attempts thereof.[1] Appellees also presented evidence that, prior to SOF's acceptance of Savage's ad, law enforcement officials had contacted SOF staffers on two separate occasions in connection with investigations of crimes—a solicitation to commit murder in Houston, Texas, and a kidnapping in New Jersey—linked to SOF personal service ads.

In his trial testimony, SOF president Robert K. Brown denied having any knowledge of criminal activity associated with SOF's personal service ads at any time prior to Braun's murder in August 1985.[2] Both Jim Graves, a former managing editor of SOF, and Joan Steel, the advertising manager who accepted Savage's advertisement, similarly testified that they were not aware of other crimes connected with SOF ads prior to running Savage's ad. Steel further testified that she had understood the term "Gun for Hire" in Savage's ad to refer to a "bodyguard or protection service-type thing," rather than to any illegal activity.

At the end of the five day trial, the district court gave the following instructions on negligence to the jury:

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[1] National magazines like *Time* and *Newsweek* carried some of these stories. Others were reported in local newspapers published in and around Bouler, Colorado, the city in which SOF is based.

[2] Appellees presented evidence that SOF subscribed to a clipping service which culled articles mentioning SOF from hundreds of newspapers and magazines. SOF maintained a multi-volume collection of these articles which was introduced into evidence. These volumes contained none of the articles appellees introduced as evidence that SOF personal service classified ads were linked to criminal activity.

In order to prevail in this case Plaintiffs must prove to your reasonable satisfaction by a preponderance of the evidence that a reasonable reading of the advertisement in this case would have conveyed to a magazine publisher, such as Soldier of Fortune, that this ad presented the clear and present danger of causing serious harm to the public from violent criminal activity. The Plaintiffs must prove that the ad in question contained a clearly identifiable unreasonable risk, that the offer in the ad is one to commit a serious violent crime, including murder.

Now, while Defendants owe a duty of reasonable care to the public, the magazine publisher does not have a duty to investigate every ad it publishes. Defendants owe no duty to the Plaintiffs for publishing an ad if the ad's language on its face would not convey to the reader that it created an unreasonable risk that the advertiser was available to commit such violent crimes as murder.

Now, of course, the tendency to read the advertisement in question in hindsight is hard to avoid, but it must be avoided. The test for you is not how the advertisement in question reads now in light of subsequent events, but rather how the advertisement read to a reasonable publisher at the time of publication. You should view the facts and these instructions with particular care in this case, in view of the First Amendment to the Constitution, which protects the free flow of truthful and legitimate information even when it is of a commercial rather than a political nature.

The district court further instructed that, if the jury found that SOF was negligent and that this negligence was the proximate cause of appellees' father's death, it could "award damages for the value of the life of Richard Braun," but not for mental anguish, emotional distress, or the family's loss of companionship. The court also

stated that, if the jury found that SOF was negligent and that this negligence was the proximate cause of appellee Michael Braun's injuries, it could award full compensation, including recovery for both physical pain and mental anguish. The district court also noted that Georgia law permitted punitive damages for appellee Michael Braun's personal injury claim but that, to award punitive damages, the jury must first find that SOF "acted maliciously or with an entire want of care which constitutes conscious indifference to the consequences."

The jury returned a verdict in favor of appellees and awarded compensatory damages on the wrongful death claim in the amount of $2,000,000. The jury also awarded appellee Michael Braun $375,000 in compensatory damages and $10,000,000 in punitive damages for his personal injury claim. The district court entered judgment in accordance with the jury's verdict on December 7, 1990.

On January 23, 1991, the district court denied SOF's motion for judgment notwithstanding the verdict, but ruled that it would grant SOF's motion for a new trial unless there were an agreement to a remittitur reducing the punitive damages awarded to $2,000,000. Appellees agreed to the remittitur, and an amended judgment was entered on February 6, 1991. 757 F.Supp. 1732. SOF appeals.

III. DISCUSSION

The district court, sitting in Alabama, properly looked to Georgia law in resolving appellees' negligence claims. In *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 494, 61 S.Ct. 1020, 1020, 85 L.Ed. 1477 (1941), the Supreme Court held that "in diversity cases the federal courts must follow conflict of laws rules prevailing in the states in which they sit." Under Alabama law, "the substantive law of the state where the injury occurred is applied when suit is brought in Alabama." *Bodnar v. Piper Aircraft Corp.*, 392 So.2d 1161, 1162 (Ala.1980). Since Richard Braun's murder and appellee Michael Braun's injuries both occurred in Georgia, Alabama

conflict of laws rules required that the district court apply Georgia law.

A. *Duty Under Georgia Law*

To prevail in an action for negligence in Georgia, a party must establish the following elements:

> (1) A legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and (4) some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of the legal duty.

Bradley Center, Inc. v. Wessner, 250 Ga. 199, 296 S.E.2d 693, 695 (1982) (citing *Lee Street Auto Sales, Inc. v. Warren*, 102 Ga.App. 345, 116 S.E.2d 243 (1960)). Under Georgia law, the existence of a legal duty presents a threshold question of law for the court. *First Federal Sav. Bank of Brunswick v. Fretthold*, 195 Ga.App. 482, 394 S.E.2d 128 (1990). Once a court finds that a legal duty exists, it generally leaves for the jury issues of negligence and proximate cause. *Hogan v. Pony Exp. Courier Corp.*, 195 Ga.App. 592, 394 S.E.2d 391, 392 (1990).

The district court found that publishers like SOF have a duty to the public when they publish an advertisement if "the ad in question contain[s] a clearly identifiable unreasonable risk, that the offer in the ad is one to commit a serious violent crime, including murder." SOF argues that the district court erred in finding that a publisher has a duty "to reject ambiguous advertisements that pose a threat of harm," Brief for Appellants at 24, and contends that a publisher should be held liable for publishing an ad only if the ad explicitly solicits a crime. Since the existence of a duty presents a question

of law, we subject the district court's determination to *de novo* review. *Newell v. Prudential Ins. Co. of America*, 904 F.2d 644, 649 (11th Cir.1990).

Georgia courts recognize a "general duty one owes to all the world not to subject them to an unreasonable risk of harm." *Bradley Center*, 296 S.E.2d at 695. Accordingly, the district court properly found that SOF had a legal duty to refrain from publishing advertisements that subjected the public, including appellees, to a clearly identifiable unreasonable risk of harm from violent criminal activity. To the extent that SOF denies that a publisher owes *any* duty to the public when it publishes personal service ads, its position is clearly inconsistent with Georgia law. We believe, however, that the crux of SOF's argument is not that it had no duty to the public, but that, as a matter of law, the risk to the public presented when a publisher prints an advertisement is "unreasonable" only if the ad openly solicits criminal activity. *See* Reply Brief for Appellants at 24.

1. Risk-Utility Balancing

To determine whether the risk to others that an individual's actions pose is "unreasonable," Georgia courts generally apply a risk-utility balancing test. *See Hanchey v. Hart*, 120 Ga.App. 677, 171 S.E.2d 918, 921 (1969); *Johnson v. Thompson*, 111 Ga.App. 654, 143 S.E.2d 51, 53 (1965); *Ely v. Barbizon Towers, Inc.*, 101 Ga.App. 872, 115 S.E.2d 616, 620 (1960). A risk is unreasonable if it is "of such magnitude as to outweigh what the law regards as the utility of the defendant's alleged negligent conduct." *Johnson*, 143 S.E.2d at 53. Simply put, liability depends upon whether the burden on the defendant of adopting adequate precautions is less than the probability of harm from the defendant's unmodified conduct multiplied by the gravity of the injury which might result from the defendant's unmodified conduct. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

For the reasons stated below, we find that the district court properly struck the risk-utility balance when it instructed that the jury could hold SOF liable for printing Savage's advertisement only if the advertisement on its face would have alerted a reasonably prudent publisher to the clearly identifiable unreasonable risk of harm to the public that the advertisement posed. Our application of Georgia's risk-utility balancing principles persuades us that the duty of care the district court imposed on publishers was an appropriate reconciliation of Georgia's interest in providing compensation to victims of tortious conduct with the First Amendment concern that state law not chill protected speech. Accordingly, we reject SOF's argument that the district court's instructions "place[d] an intolerable burden upon the press." Brief for Appellants at 20.

SOF relies heavily on *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir.1989), *cert. denied*, 493 U.S. 1024, 110 S.Ct. 729, 107 L.Ed.2d 748 (1990), to support its contention that the district court erred in its application of risk-utility balancing to this case. In *Eimann*, the son and mother of a murder victim brought a wrongful death action under Texas law against SOF, seeking to hold SOF liable for publishing a personal service ad through which the victim's husband hired an assassin to kill her. The advertisement in question read:

> EX-MARINES—67-69 'Nam Vets, Ex-DI, weapons specialist-jungle warfare, pilot, M.E., high risk assignments, U.S. or overseas. (404) 991-2684.

Id. at 831. The district court instructed the jury that it could find SOF liable if "(1) the relation to illegal activity appears on the ad's face; or (2) 'the advertisement, embroidered by its context, would lead a reasonable publisher of ordinary prudence under the same or similar circumstances to conclude that the advertisement could reasonably be interpreted' as an offer to commit crimes."

Id. at 833 (quoting district court instructions). The jury found for plaintiffs and awarded them $1.9 million in compensatory damages and $7.5 million in punitive damages. *Id.*

The Fifth Circuit reversed the jury's verdict. After applying Texas risk-utility balancing principles similar to Georgia's, the court concluded that "[t]he standard of conduct imposed by the district court against SOF is too high. . . ." *Id.* at 838. To impose liability whenever the advertised product "could reasonably be interpreted as an offer to engage in illegal activity" would require a publisher to reject all ambiguous ads. *Id.* at 837. The court stated: "Without a more specific indication of illegal intent than [this] ad or its context provided, we conclude that SOF did not violate the required standard of conduct by publishing an ad that later played a role in criminal activity." *Id.* at 838.

SOF's reliance on *Eimann* is misplaced. We distinguish *Eimann* from this case based on the instructions to the respective juries.[3] In *Eimann*, the district court violated risk-utility balancing principles when it allowed the jury to impose liability on SOF if a reasonable publisher would conclude "that the advertisement *could reasonably be interpreted*" as an offer to commit crimes. 880 F.2d at 833 (emphasis added). The Fifth Circuit correctly observed that virtually anything *might* involve illegal activ-

[3] Appellees also argue that *Eimann* is distinguishable from the present case because the advertisement at issue in *Eimann* was "facially innocuous" and "ambiguous in its message" while Savage's advertisement clearly conveyed that the advertiser was "ready, willing and able" to use his gun to commit crimes. Brief for Appellees at 27. We agree. The advertisement in *Eimann* merely listed the advertisers' qualifications and indicated a willingness to accept risky assignments in the United States or overseas. Unlike Savage's ad, the ad in *Eimann* did not contain language that would alert a reasonable publisher to the clearly identifiable unreasonable risk that the advertisers were offering criminal services. *See infra* part III.A.3 (analysis of Savage's ad).

ity, *id.* at 837, and that applying the district court's standard would mean that a publisher "must reject *all* [ambiguous] advertisements," *id.* at 838 (emphasis in original), or risk liability for any "untoward consequences that flow from his decision to publish" them, *id.*

In this case, the district court stressed in its instructions that the jury could hold SOF liable only if the ad on its face contained a "clearly identifiable unreasonable risk" of harm to the public. We are convinced that the district court's use of phrases like "clear and present danger" and "clearly identifiable unreasonable risk" properly conveyed to the jury that it could not impose liability on SOF if Savage's ad posed only an unclear or insubstantial risk of harm to the public and if SOF would bear a disproportionately heavy burden in avoiding this risk.[4] The jury instructions in *Eimann*, in contrast, did not preclude the jury from imposing liability on the basis of an ambiguous advertisement that presented only an unclear risk of harm to the public.

Furthermore, in *Eimann*, the district court instructed that, even if the face of the ad did not reveal its connection to illegal activity, the jury could hold the publisher liable if a reasonably prudent publisher would discover the connection to crime through investigation of the advertisement's "context." 880 F.2d at 833. It is significant that the district court in this case did not impose such a duty. *See infra* part III.A.2. The district

[4] It is possible that the district court's use of the phrase "clear and present danger" may have resulted in the jury applying a standard more demanding than the "modified" negligence standard articulated in the text below. *See infra* part III.A.2. Because we believe that the district court's instruction—that plaintiffs must prove that Savage's ad on its face, without the need for investigation contained a "clearly identifiable unreasonable risk" of harm to the public—satisfied both Georgia law and the First Amendment, *see id.*, we need not discuss whether the district court's "clear and present danger" instruction actually required plaintiffs to satisfy a stricter standard.

court here stressed that the jury could find SOF liable only if Savage's ad "on its face" would convey to a reasonable publisher that the ad created a "clearly identifiable unreasonable risk" of harm to the public.

For the foregoing reasons, we conclude that the decision in *Eimann* is distinguishable.

2. First Amendment Limitations

SOF further argues that the district court erred in instructing the jury to apply a negligence standard because the First Amendment forbids imposing liability on publishers for publishing an advertisement unless the ad openly solicits criminal activity. We agree with appellants that "the Constitution delimits a State's power" to award remedies for civil torts. *New York Times v. Sullivan*, 376 U.S. 254, 283, 84 S.Ct. 710, 727, 11 L.Ed.2d 686 (1964).[5] In cases where state laws burden the exercise of freedom of speech, the Supreme Court has stressed that judges must attempt "to reconcile state law with . . . competing interest[s] grounded in the constitutional command of the First Amendment." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789 (1974).[6] Therefore, we must evaluate the district

[5] In *New York Times*, the Supreme Court held that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil [tort] law." 376 U.S. at 277, 84 S.Ct. at 724. This conclusion recognized that "[t]he fear of damage awards under [state tort law] may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Id.*, 84 S.Ct. at 724.

[6] Georgia courts have been sensitive to the need to take into consideration First Amendment values when defining the scope of Georgia's tort remedies. *See, e.g., Walt Disney Productions, Inc. v. Shannon*, 247 Ga. 402, 276 S.E.2d 580 (1981) (limiting recovery for personal injury); *Cox Broadcasting Corp. v. Cohn*, 231 Ga. 60, 200 S.E.2d 127, 131 (1973), *rev'd*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) (attempting to resolve "head-on collision between the tort of public disclosure and First Amendment rights of freedom of speech and press").

court's instructions to ensure that they adequately protected the First Amendment values this case presents.

In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976) (hereinafter *Virginia Pharmacy Board*) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385, 93 S.Ct. 2553, 2558, 37 L.Ed.2d 669 (1973)), the Supreme Court recognized that the First Amendment protects speech, like Savage's ad, "which does 'no more than propose a commercial transaction.'" The Court observed that a "particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* 425 U.S. at 763, 96 S.Ct. at 1826. In addition, the Court noted that society has an interest in commercial speech because it facilitates intelligent and well-informed economic decisions. *Id.* at 765, 96 S.Ct. at 1827; *see also Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 561-62, 100 S.Ct. 2343, 2349, 65 L.Ed.2d 341 (1980).

Imposing tort liability for publishing advertisements which result in injury directly implicates the First Amendment interest in commercial speech. It is well-settled that the First Amendment does not protect commercial speech "related to illegal activity," *Central Hudson*, 447 U.S. at 564, 100 S.Ct. at 2350, and, thus, there is no constitutional interest in publishing personal service ads that solicit criminal activity, *Pittsburgh Press*, 413 U.S. at 388, 93 S.Ct. at 2560 ("We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes."). However, if state tort law places too heavy a burden on publishers with respect to the advertisements they print, the fear of liability might impermissibly impose a form of self-censorship on publishers. *See* Michael I. Meyerson, *This Gun for Hire: Danc-*

ing in the Dark of the First Amendment, 47 Wash. & Lee L.Rev. 267, 270 (1990). Such a chilling effect would compromise the First Amendment interest in commercial speech by depriving protected speech "of a legitimate and recognized avenue of access to the public." *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 493, 82 S.Ct. 1432, 1440, 8 L.Ed.2d 639 (1962).

This case poses a greater risk than one finds in ordinary commercial speech cases that a state's regulatory regime or tort law will impermissibly chill publishers from printing commercial speech which enjoys First Amendment protection. Most cases involving regulation of commercial speech present only a minor risk that overly broad regulation will chill protected commercial speech because, generally speaking, "advertising is linked to [the] commercial well-being" of the speaker. *Bates v. State Bar of Arizona*, 433 U.S. 350, 381, 97 S.Ct. 2691, 2707, 53 L.Ed.2d 810 (1977); *see also Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 481, 109 S.Ct. 3028, 3035, 106 L.Ed.2d 388 (1989); *Virginia Pharmacy Board*, 425 U.S. at 771 n. 24, 96 S.Ct. at 1830 n. 24. The advertiser's strong economic interest helps ensure that its particular message reaches the public, even in the face of restrictive regulations. However, "in the advertising context, a publisher only provides a forum for the actual speaker as a means of communicating with the listener." Lisa F. Firenze, Note, *Publishers' Liability for Commercial Advertisements: Testing the Limits of the First Amendment*, 23 Col.J.L. & Soc. Probs. 137, 167 (1999). Accordingly, since "[p]ublishers do not tout their own products or services," they "have a far smaller financial interest than advertisers in the advancement of any one particular product or service." *Id.* at 149.

SOF further argues that imposing liability on publishers for the advertisements they print indirectly threatens core, non-commercial speech to which the Constitu-

tion accords its full protection. *Cf. Central Hudson*, 447 U.S. at 562-63, 100 S.Ct. at 2350 (First Amendment affords greater protection to non-commercial speech); *Virginia Pharmacy Board*, 425 U.S. at 771 n. 24, 96 S.Ct. at 1830 n. 24 (same). In *Eimann*, 880 F.2d at 837, the Fifth Circuit agreed that "the publication's editorial content would surely feel the economic crunch from loss of revenue that would result if publishers were required to reject all ambiguous advertisements." *See also United States v. Hunter*, 459 F.2d 205, 212 (4th Cir.), *cert. denied*, 409 U.S. 934, 93 S.Ct. 235, 34 L.Ed.2d 189 (1972); *Walters v. Seventeen Magazine*, 195 Cal.App.3d 1119, 1122, 241 Cal.Rptr. 101, 103 (1987). SOF also alleges that payment of the jury's verdict would force the magazine to close and, consequently, would deprive public debate of SOF's protected, non-commercial speech. *See Yuhas v. Mudge*, 129 N.J.Super. 207, 209-10, 322 A.2d 824, 825 (1974).

The district court was sensitive to the need to reconcile Georgia's interest in imposing liability on publishers for printing advertisements related to criminal activity with the First Amendment's concern that state law not chill protected expression. Accordingly, the court instructed the jury to apply a "modified" negligence standard under which SOF had no legal duty to investigate the ads it printed. The district court stressed that the jury could find SOF negligent only if Savage's advertisement "on its face" would have alerted a reasonably prudent publisher that the "ad in question contained a clearly identifiable unreasonable risk, that the offer in the ad is one to commit a serious violent crime." For the reasons set out below, we conclude that the district court's "modified" negligence standard satisfied the First Amendment's interests in protecting the commercial and core speech at issue in this case.

Supreme Court cases discussing the limitations the First Amendment places on state defamation law indicate that there is no constitutional infirmity in Georgia

law holding publishers liable under a negligence standard with respect to the commercial advertisements they print. In *New York Times v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 726, the Court held that the First Amendment interest in protecting discussion of matters of great public concern "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." However, in subsequent opinions, the Court has clearly stated that the First Amendment does not require this high level of protection for all speech in all contexts. In *Gertz v. Robert Welch, Inc.*, 418 U.S. at 346, 94 S.Ct. at 3010, the Court held that, as long as a state does not impose liability without fault, it may constitutionally hold a publisher liable for "defamatory falsehood injurious to the reputation of a private individual." In light of the fact that the Court has found that a negligence standard satisfies the First Amendment's concern for the non-commercial, core speech at issue in *Gertz*, we see no constitutional infirmity in Georgia tort law holding publishers liable under a negligence standard with respect to the commercial advertisements they print. *Cf. Pittsburgh Press*, 413 U.S. at 388, 93 S.Ct. at 2560 (newspaper violated anti-discrimination ordinance where ad implied advertiser was "*likely* to discriminate against women in his hiring decisions") (emphasis added).

Past Supreme Court decisions indicate, however, that the negligence standard that the First Amendment permits is a "modified" negligence standard. The Court's decisions suggest that Georgia law may impose tort liability on publishers for injury caused by the advertisements they print only if the ad on its face, without the need to investigate, makes it apparent that there is a substantial danger of harm to the public. In *Gertz*, for

example, the Court held that a state could impose liability on a publisher who negligently printed a defamatory statement whose substance made "substantial danger to reputation *apparent*." 418 U.S. at 348, 94 S.Ct. at 3011 (emphasis added); *see also Pittsburgh Press*, 413 U.S. at 387-88, 93 S.Ct. at 2560 (upholding municipal ordinance prohibiting newspaper from carrying sex-designated advertising columns because mere choice to advertise in sex-designated column implied advertiser likely to discriminate in hiring). Significantly, the Court noted that its inquiry would be different "if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." *Gertz*, 418 U.S. at 348, 94 S.Ct. at 3011; *cf. Time, Inc. v. Hill*, 385 U.S. 374, 389, 87 S.Ct. 534, 542-43, 17 L.Ed.2d 456 (1967) (in action for invasion of privacy, concern about "saddl[ing] the press with the impossible task of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait"). For cases reaching a similar conclusion, see *Walters*, 195 Cal.App.3d 1119, 241 Cal.Rptr. 101 (advertisement for tampons which caused toxic shock); *cf. Pittman v. Dow Jones & Co.*, 662 F.Supp. 921 (E.D.La.), *aff'd*, 834 F.2d 1171 (5th Cir.1987) (fraudulent advertisement offering "jumbo" interest rates on deposits in Texas financial institutions); *Yuhas*, 129 N.J.Super. 207, 322 A.2d 824 (advertisement for defective fireworks).

Based upon the foregoing authorities, we conclude that the First Amendment permits a state to impose upon a publisher liability for compensatory damages[7] for negligently publishing a commercial advertisement where the ad on its face, and without the need for investigation, makes it apparent that there is a substantial danger of

[7] The Supreme Court's decisions indicate that a different rule would apply to presumed damages or punitive damages. *Gertz*, 418 U.S. at 348-50, 94 S.Ct. at 3011-12.

harm to the public. The absence of a duty requiring publishers to investigate the advertisements they print and the requirement that the substance of the ad itself must warn the publisher of a substantial danger of harm to the public guarantee that the burden placed on publishers will not impermissibly chill protected commercial speech. *Cf. Hunter*, 459 F.2d at 213 (where law prohibits advertisements which, on their face, communicate discriminatory preference in sale or rental of dwellings, publisher "can easily distinguish between permissible and impermissible advertisements"). Furthermore, these limitations on tort liability ensure that the burden imposed on publishers will have only a minimal impact on their advertising revenue, and, consequently, on their ability to publish non-commercial speech. Cf. *id.*[8]

We conclude that the instructions fashioned by the district court in this case properly reflect the "modified" negligence standard that the First Amendment permits. The court's instructions modified the ordinary negligence standard to relieve SOF of any duty to investigate the advertisements it prints. In addition, the instructions required that the language of the ad itself contain a clearly identifiable unreasonable risk of harm to the public. The instructions stated:

> Plaintiffs must prove . . . that a reasonable reading of the advertisement in this case would have conveyed to a magazine publisher, such as Soldier of Fortune, that this ad presented the clear and present danger of causing serious harm to the public from violent criminal activity. Plaintiffs must prove that

[8] As for SOF's argument that the district court's judgment would force the magazine out of business and, thus, silence its protected speech, we observe that the Supreme Court has squarely rejected the notion that the First Amendment interest in protected speech requires that "publishers and broadcasters enjoy an unconditional and indefeasible immunity from [tort] liability." *Gertz*, 418 U.S. at 341, 94 S.Ct. at 3007.

> the ad in question contained a clearly identifiable unreasonable risk, that the offer in the ad is one to commit a serious violent crime, including murder.
>
> Now, while defendants owe a duty of reasonable care to the public, the magazine publisher does not have a duty to investigate every ad it publishes. Defendants owe no duty to the plaintiffs for publishing an ad if the ad's language on its face would not convey to the reader that it created an unreasonable risk, that the advertiser was available to commit such violent crimes as murder.

Thus, the instructions in this case expressly relieved SOF of any duty to investigate the ad, expressly instructed the jury to determine liability on the basis of the language of the ad on its face, and, finally, expressly instructed the jury that the risk of harm to the public must be clearly identifiable.[9] We conclude that these instructions satisfy the First Amendment requirement articulated above that the ad on its face must make it apparent that there is a substantial danger of harm to the public.[10]

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[9] We recognize that the second paragraph of the instructions quoted immediately above in the text refers to the ad's language on its face as creating an "unreasonable risk" of harm without prefacing that term with the term "clearly identifiable," as was done in the immediately preceding paragraph of the instructions. In this case, we need not decide whether an instruction which merely states that the ad on its face must convey to the reader that the ad created an unreasonable risk of harm to the public satisfies the First Amendment requirement that the ad on its face make it apparent that there is a substantial danger of harm to the public. The First Amendment limitation may well be satisfied because the risk of harm must be conveyed by the language of the ad on its face and because the risk of harm must be unreasonable. However, that question need not be decided in this case because we are convinced that the instructions considered as a whole conveyed to the jury that the plaintiff must prove that the ad in question contained a *clearly identifiable* unreasonable risk of harm to the public.

[10] SOF's argument that the district court's instructions placed a duty upon it to reject ambiguous advertisements is without merit

3. Independent First Amendment Review

Having determined that the district court properly instructed the jury regarding a publisher's duty to the public under Georgia law, we now turn to SOF's argument that the jury erred in applying that law when it found that SOF owed a duty to appellees to refrain from publishing the Savage ad. Ordinarily, "[i]n reviewing a jury's verdict, . . . a court is not entitled to weigh the evidence anew," but merely examines the record for "evidence substantial enough to support the jury's verdict." *Lindsey v. American Cast Iron Pipe Co.*, 772 F.2d 799, 801 (11th Cir.1985). However, the Supreme Court has held that, in cases involving First Amendment claims, an appellate court must undertake independent review of the record "in order to make sure that 'the [trial court's] judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984) (quoting *New York Times*, 376 U.S. at 285, 84 S.Ct. at 729);[11] *see also Don's Porta*

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since the court's instructions required a *clearly identifiable* unreasonable risk of harm. As noted above, this aspect of the instructions in this case also distinguishes this case from *Eimann v. Soldier of Fortune, Inc.*, 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024, 110 S.Ct. 729, 107 L.Ed.2d 748 (1990).

[11] In *Bose Corp.*, 466 U.S. at 505, 104 S.Ct. at 1962, the Supreme Court noted that, in cases in which it is contended that the communication at issue is within a class of unprotected speech, "the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." It further observed that "[p]roviding triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Id.*, 104 S.Ct. at 1962 (footnote omitted). Accordingly, the Court stressed that "the rule of independent review assigns to judges a constitutional

Signs, Inc. v. City of Clearwater, 829 F.2d 1051, 1053 n. 9 (11th Cir.1987), *cert. denied*, 485 U.S. 981, 108 S.Ct. 1280, 99 L.Ed.2d 491 (1988). In order to guarantee that the jury imposed no greater burden on SOF than the Constitution permits, we submit to independent examination the jury's finding that Savage's ad, on its face, would convey to a reasonably prudent publisher that it created a clearly identifiable unreasonable risk that the advertiser was available to commit serious violent crimes.

Our review of the language of Savage's ad persuades us that SOF had a legal duty to refrain from publishing it. Savage's advertisement (1) emphasized the term "Gun for Hire," (2) described Savage as a "professional mercenary," (3) stressed Savage's willingness to keep his assignments confidential and "very private," (4) listed legitimate jobs involving the use of a gun—bodyguard and courier—followed by a reference to Savage's "other special skills," and (5) concluded by stating that Savage would consider "[a]ll jobs." The ad's combination of sinister terms makes it apparent that there was a substantial danger of harm to the public. The ad expressly solicits all jobs requiring the use of a gun. When the list of legitimate jobs—i.e., body guard and courier—is followed by "other special skills" and "all jobs considered," the implication is clear that the advertiser would consider illegal jobs. We agree with the district court that "the language of this advertisement is such that, even though couched in terms not explicitly offering criminal services, the publisher could recognize the offer of criminal activity as readily as its readers obviously did." *Braun v. Soldier of Fortune*, 749 F.Supp. 1083, 1085 (M.D.Ala.1990).[12]

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responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge." *Id.* at 501, 104 S.Ct. at 1959.

[12] The undisputed evidence that the overwhelming majority of the calls Savage received in response to his ad were solicitations for criminal activity undermines SOF's argument that appellees pre-

We emphasize that we are not adopting a *per se* rule that all advertisements using terms such as "Gun for Hire" present a clearly identifiable unreasonable risk of harm to the public from violent criminal activity. An advertiser certainly could use such terms in a metaphoric or humorous manner that would not indicate a clear risk of substantial danger to the public. However, viewing the advertisement that Savage submitted to SOF in its entirety, we conclude that the ad on its face makes it apparent that there was a substantial danger that Savage was soliciting illegal jobs involving the use of a gun. Thus, the First Amendment standard articulated above was satisfied.

B. *Proximate Cause*

SOF's sole remaining claim [13] is that the jury erred in finding that SOF's publication of Savage's ad was the

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sented no evidence that a reasonably prudent publisher should have recognized that Savage's ad posed a clearly identifiable unreasonable risk that it was an offer to commit crimes for money. As the Fourth Circuit noted in *United States v. Hunter*, 459 F.2d at 213, a publisher can divine an advertiser's intent to violate the law "as well as any of its readers."

[13] *Gertz*, 418 U.S. at 348-50, 94 S.Ct. at 3011-12, indicates that punitive damages are recoverable only upon satisfaction of the actual malice standard set out in *New York Times v. Sullivan*. However, we decline to address SOF's argument in its reply brief that the evidence does not support the jury's verdict awarding punitive damages. The waiver rule requires that an appellant state and address in its initial brief the issues for appellate review "because '[i]n preparing briefs and arguments, an appellee is entitled to rely on the content of an appellant's brief for the scope of the issues appealed.'" *Federal Sav. and Loan Ins. Corp. v. Haralson*, 813 F.2d 370, 373 n. 3 (11th Cir. 1987) (quoting *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983)); *see also* Fed.R.App.P. 28(a). SOF did not mention the punitive damages issue in its initial brief on appeal, and, therefore, we find that SOF has waived its right to contest the grant of punitive damages. In addition, we note that SOF's challenge to the punitive damages award consisted merely of a cursory argument in a footnote of its reply brief and that, at oral argument, SOF's counsel expressly stated that SOF had no interest in the punitive damages issue since

proximate cause of appellees' injuries. SOF argues that the events which intervened between its publication of Savage's ad and the carrying out of the murder plot were entirely unforeseeable and, therefore, that SOF's publication of Savage's ad was too remote in the chain of events leading to appellees' injuries for the jury to hold SOF liable. Since the proximate cause issue does not implicate any constitutional values, we review the jury's factual finding under the traditional standard of deference to the fact finder. *See Bose Corp.*, 466 U.S. at 514 n. 31, 104 S.Ct. at 1967 n. 31.

We find that the jury had ample grounds for finding that SOF's publication of Savage's ad was the proximate cause of appellees' injuries. Georgia law recognizes that, "[g]enerally, the intervening criminal act of a third party, without which the injury would not have occurred, will be treated as the proximate cause of the injury, superseding any negligence of the defendant. . . ." *Rosinek v. Cox Enterprises, Inc.*, 166 Ga.App. 699, 305 S.E.2d 393, 394 (1983). If, however, "the criminal act was a reasonably foreseeable consequence of the defendant's conduct, the casual connection between that conduct and the injury is not broken." *Id.* 305 S.E.2d at 394-95; *see also Craine v. United States*, 722 F.2d 1523, 1525 (11th Cir.1984). We have already held that the language of Savage's ad should have alerted a reasonably prudent publisher to the clearly identifiable unreasonable risk that Savage was soliciting violent and illegal jobs. It follows that a reasonable jury could conclude that the criminal act that harmed appellees was reasonably foreseeable and, accordingly, that the chain of causation was not broken.

For the foregoing reasons, we AFFIRM the district court's judgment.

AFFIRMED.

SOF believed that the compensatory damages alone would drive appellants out of business.

ESCHBACH, Senior Circuit Judge, dissenting:

This case poses a difficult and specific question of law for which we have little guidance. The First Amendment imposes strict limits on states' ability to subject publishers to tort liability for defamations they publish. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 1412 (1964). While this case is broadly analogous in that it involves constitutional restrictions on state tort law as applied to publishers, it presents a number of tortuous twists. We must determine whether the First Amendment limits states' ability to subject publishers to tort liability for wrongful death actions where the wrongful death was facilitated by a third-party's commercial speech for which the publisher provided a forum or billboard. The majority's thorough opinion does a remarkable job of tackling this unique question, and I fully agree with its imaginative interpretation of scant precedent. Nevertheless, I differ with the majority's application of the law to the facts of this case. Specifically, in discharging our duty of independent first amendment review of the language of Savage's ad, *see ante* slip opinion at 3558-3559, I remain convinced that the language of the advertisement is ambiguous, rather than patently criminal as the majority believes. And although the majority has carefully culled the legal standards it applies from the jury instructions, I remain concerned over whether the instructions were clear enough that the jury could have done so well. Because of the confluence of these two concerns—the ambiguity of both the advertisement and the jury instructions—I am not confident that the jury actually found that this advertisement was a clear solicitation for criminal activity. Under these circumstances, I am unable to uphold the crushing third-party liability the jury has imposed on Soldier of Fortune Magazine. I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 88-H-314-N

MICHAEL F. BRAUN,
Plaintiff

vs.

SOLDIER OF FORTUNE MAGAZINE, INC. &
OMEGA GROUP, LTD.,
Defendants

Civil Action No. 88-H-315-N

MICHAEL F. BRAUN & IAN BRAUN,
Plaintiffs

vs.

SOLDIER OF FORTUNE MAGAZINE, INC. &
OMEGA GROUP, LTD.,
Defendants

MEMORANDUM OPINION

[Filed Jan. 23, 1991]

Plaintiffs Michael F. Braun and Ian Braun filed this action on March 31, 1988 against defendants Soldier of Fortune Magazine, Inc. ("SOF") and its parent company, Omega Group, Ltd., seeking damages for the wrongful death of their father, Richard F. Braun. Plaintiff

Michael Braun also filed a separate action seeking recovery for personal injuries he received at the time of his father's death. Plaintiffs contended that the defendants were liable for the death of their father and for the injuries suffered by Michael Braun because the defendants negligently published a personal service advertisement in Soldier of Fortune magazine which created an unreasonable risk for the solicitation and commission of violent criminal activity, including murder.

On December 7, 1990, following a five day trial, the jury returned a verdict in favor of plaintiffs and awarded compensatory damages on the wrongful death claim in the amount of $2,000.000. The jury also awarded Michael Braun $375,000 in compensatory damages and $10,000,000 in punitive damages for his personal injury claim. Defendants have filed a motion for judgment notwithstanding the verdict, or in the alternative for a new trial, or in the alternative, for remittitur. A hearing was held on this motion on January 18, 1991.

I. STANDARD OF REVIEW

The standard to be applied by this Court in considering this motion was set forth in *Boeing Company v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc):

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impar-

> tial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question.

Id. at 374-75, *quoted in Von Stein v. Brescher*, 904 F.2d 572, 578 (11th Cir. 1990). A review of the evidence shows that the under the *Boeing* standard, defendants' motion for judgment N.O.V. is due to be denied.

II. EVIDENCE AT TRIAL

The evidence presented at trial revealed a sequence of events which have not been the source of much dispute. On August 26, 1985, as Richard Braun and his sixteen year-old son Michael were leaving Richard Braun's suburban Atlanta home, Sean Trevor Doutre stepped in front of Braun's car and fired several shots into the car with a MAC 11 automatic pistol. Richard and Michael rolled out of the car on opposite sides into the driveway. Doutre walked over and fired two more shots into the back of Richard Braun's head. Doutre then walked over to Michael, who had been shot in the thigh, raised his gun and aimed it at Michael, but did not fire. Instead, Doutre put his finger over his lips signaling Michael to be quiet and ran into the woods.

Doutre was the contract killer employed by Richard Savage. Bruce Gastwirth, Richard Braun's business associate, used John Horton Moore to contact and hire Savage to kill Richard Braun. Gastwirth learned of Savage through an ad that Savage had placed in Soldier of Fortune Magazine, which read:

> GUN FOR HIRE: 37-year old professional mercenary desires jobs. Vietnam Veteran. Discreet and very private. Body guard, courier, and other special skills. All jobs considered. Phone (615) 436-9785 (days) or (615) 436-4335 (nights), or write: Rt. 2, Box 682 Village Loop Road, Gatlinburg, TN 37738.

Ms. Joan Steele, SOF's advertising manager at the time the Savage ad was placed, edited the Savage ad herself, and had several contacts with Savage concerning the wording of his ad. She required that the phrase "any and all jobs" be deleted from Savage's ad. Before running the Savage ad in SOF, she sent Savage a letter explaining the need to change the language in his ad. Savage responded by telling Ms. Steele to edit the ad any way she liked. The end result was that the original phrase "any and all jobs considered" was edited by her and read "all jobs considered." The only explanation that she could offer for the change was that the phrase "any and all jobs considered" was too vague; hence, the substitution "all jobs considered." [1]

Savage testified that, after the ad appeared in SOF, he received some thirty calls a week inquiring as to his availability to perform various criminal acts, including many that solicited his services for kidnapping or murder. Quite clearly, the language contained in Savage's ad was acted upon by many people as an offer to commit serious violent crime. Savage agreed to kill other persons where his services were solicited in response to the ad. In some of these instances, he accepted "up front" money but never actually performed the job. Doutre, the triggerman who killed Richard Braun and shot Michael Braun, saw the Savage ad in SOF and traveled from Canada to go to work for Savage. Doutre executed at least two people

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[1] Editing was done on the personal service ads ostensibly to improve the "image" of the magazine, which was attempting to attract larger corporate commercial advertisers.

for Savage after persons contacted Savage through the SOF ad.

The publisher and founder of SOF, Robert K. Brown, and Ms. Steele, the magazine's former advertising manager, both denied having any knowledge of criminal activity associated with personal service ads placed in the magazine. In an attempt to show that defendants knew of the likelihood that criminal activity would result from placing an ad of the type in question, plaintiffs introduced evidence of various newspaper and magazine articles relating to crimes linked to SOF personal services ads. Plaintiffs also showed that defendants subscribed to a clipping service which sent articles to SOF from hundreds of newspapers and magazines containing the slightest mention of SOF. SOF maintained a multivolume collection of these articles which were introduced into evidence. These volumes did not include, however, the articles involving crimes that allegedly were committed in response to SOF ads even though some of the articles relating to such crimes and linking those crimes to ads in SOF magazine appeared in national publications such as Time and Newsweek, as well as local publications in Colorado, which is SOF's home. For example, one such crime of kidnapping occurred in Boulder, Colorado where SOF is published. The crime was reported prominently in the Boulder and Denver newspapers, and referred to a report that the crime had been in response to an ad in SOF. In another instance, persons at SOF were contacted by law enforcement officials from Houston, Texas concerning an ad in SOF that led to the prosecution of an individual who had solicited someone through an SOF ad to poison his wife. It is apparent that the jury did not believe that SOF was unaware of the risks associated with running an ad such as the one placed by Richard Savage, and the evidence is more than sufficient to support such a finding. Although defendants have objected continuously to the introduction of any evidence of any other ads

placed in SOF other than the ad in question, such evidence was admitted where reports of such ads being linked to other crimes were reported to SOF officials or where such reports were in newspapers or magazines that reasonably would have come to the attention of defendants' personnel.

The Court finds that defendants' reliance on *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir. 1989) is misplaced. The Court does not read *Eimann* to be as sweeping as defendants contend. In fact, the holding in *Eimann* is quite narrow. The Fifth Circuit held that the ad in question in *Eimann* was, as a matter of Texas tort law, too ambiguous to impose liability on the publisher for the consequences of running that ad. *Id.* at 834. The ad in *Eimann* did not contain the language "Gun for Hire" and was different in several other respects as well. The differences between the two ads are readily apparent upon a reading of the *Eimann* ad, which read:

> EX-MARINES—67-69 'Nam Vets, Ex-DI, weapons specialist—jungle warfare, pilot, M.E., high risk assignments. U.S. or overseas. (404) 991-2684.[2]

The *Eimann* court did not hold that a publisher may never be held liable for publishing an ad that presents a risk that violent criminal activity will result, but rather, the court stated that "*[w]ithout a more specific indication of illegal intent* than Hearn's ad or its context provided, we conclude that SOF did not violate the required standard of conduct by publishing an ad that later played a role in criminal activity." *Id.* at 838 (emphasis added). Applying the familiar balancing test established by Judge Learned Hand in *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947), the *Eimann* court simply held that, due to the ambiguous wording of the ad in that case, the duty placed on the publisher was to determine whether the ad contained an offer to commit criminal

[2] The term "ex-DI" mean the advertiser was an ex-drill instructor; "M.E." referred to multi-engine planes.

acts was too burdensome in spite of the grave danger that would be present if the ad did, in fact, contain such an offer.[3] *Eimann*, 880 F.2d at 837.

At the summary judgment stage of this case, this Court found that there was a sufficient indication of illegal intent in the Savage ad to preclude the Court from granting summary judgment in favor of defendants based on the *Eimann* decision. *Braun v. Soldier of Fortune Magazine, Inc.*, 749 F. Supp. 1083 (M.D. Ala. 1990). This Court views the SOF ad run by Savage as materially different than the ad in *Eimann*, which the *Eimann* court described as "at most . . . a facially innocuous ad." *Eimann*, 880 F.2d at 836. The *Eimann* ad contained none of the phrases contained in the Savage ad such as "Gun for Hire," "Discrete and very private," or "All jobs considered." The question of whether a reasonable publisher should have foreseen that publication of the Savage ad presented an unreasonable risk that criminal activity would result was left properly to the jury. *See also Norwood v. Soldier of Fortune Magazine, Inc.*, 651 F. Supp. 1397 (W.D. Ark. 1987). The evidence in this case fully supports the jury's determination that defendants did not conform to the applicable standard of conduct, and that such negligent conduct was the proximate cause of Richard Braun's death and Michael Braun's injuries. It is apparent that an ad containing the terms "Gun for Hire," "Discreet and very private," and "All jobs considered" will be reasonably construed as an offer to perform illegal acts. This is no strained construction. A risk becomes unreasonable when its magnitude outweighs the social utility of the act or omission that creates the risk. *See Restatement (Second) of Torts* § 291 (1965). The risk

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[3] Defendant SOF argues that in *Eimann*, just as in this case, 90% of the callers who responded to the SOF ad sought participation in illegal activities, including beatings, kidnappings, jail breaks, bombings, and murders; nevertheless the *Eimann* court thought that ad imposed no basis for liability on its publisher.

in the Savage ad was the risk of murder or serious, violent crime.[4] Accordingly, defendants' motion for judgment notwithstanding the verdict is DENIED.

III. *EXCESSIVENESS OF THE VERDICT*

Defendants also have moved for a new trial, or alternatively, for remittitur. The first step for the Court is to determine whether the jury's award in this case is "grossly excessive." *Wilson v. Taylor*, 733 F.2d 1539, 1548 (11th Cir. 1984) (quoting *Grunenthal v. Long Island R. Co.*, 393 U.S. 156, 159 n.4 (1968)). The *Wilson* court also stated that the court should look to see whether the verdict is so high that it "would be a denial of justice to permit it to stand." *Id.* at 1548-49. In determining whether a given verdict is excessive, the Court is mindful that it is not to analyze the amount of the verdict in terms of whether it is higher than what the Court personally would have awarded. *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1047 (5th Cir. 1970), *modified*, 456 F.2d 180 (5th Cir.), *cert. denied*, 407 U.S. 921 (1972). The Court also is aware of the dangers of simply comparing verdicts rendered in different cases as a method for determining excessiveness. The facts of each case determine whether a jury award is excessive. *Allen v. Seacoast Products, Inc.*, 623 F.2d 355, 364-65 (5th Cir. 1980) (citing *Wiley v. Stensaker Schiffahrtsges*, 557 F.2d 1168, 1172 (5th Cir. 1977)). With this standard in mind, we look to the injuries suffered by plaintiffs in this case.

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[4] Defendants contend that, as a matter of law, any negligence they may have committed cannot be the proximate cause of the damages suffered by plaintiffs because of the intervening criminal acts of third parties. Where the criminal act, however, is the very thing that is foreseeable from a negligent act, it will not serve to insulate the original negligent actor from liability. *See Cain v. Vontz*, 703 F.2d 1279 (11th Cir. 1983) (applying Georgia law).

A. *Compensatory Damages*

The jury awarded plaintiffs $2,000,000.00 in compensatory damages for the wrongful death of Richard Braun. Under Georgia law, punitive damages may not be awarded in wrongful death cases. Compensatory damages may be awarded to compensate plaintiffs for the "full value of the life of the decedent without deducting for any of the necessary or personal expenses of the decedent had he lived." O.C.G.A. § 51-4-2. In order to establish a monetary estimation of the full value of the life of Richard Braun, plaintiffs presented the testimony of Dr. Robert Hebert, a Professor of Economics at Auburn University. Dr. Hebert calculated that the economic loss resulting from the death of Richard Braun would have been approximately $2,300,000.00. On cross-examination, defendants' counsel attempted to show to the jury that Dr. Hebert's calculations were flawed. The ultimate decision of how much to award plaintiffs for the full value of the life of the decedent was left properly to the jury. The jury's determination that plaintiffs were entitled to $2,000,000.00 for the wrongful death claim clearly is supported by the evidence, and will not be disturbed by the Court.

The jury also awarded Michael Braun $375,000 in compensatory damages for the injuries he suffered. The Court does not find this amount is excessive as a matter of law. At age sixteen, Michael was shot and watched as his father was summarily executed. The damages suffered from witnessing this tragic even will stay with Michael for a lifetime. In addition, Michael lay in terror as the gunman leveled his weapon to execute Michael, and then changed his mind and spared Michael's life, which resulted in additional pain and suffering. The Court cannot say that the amount of the jury's award is excessive.

B. *Punitive Damages*

As stated above, the jury was precluded from awarding any punitive damages under the Georgia wrongful death statute. Such a prohibition did not apply, however, to

Michael's personal injury claim. In addition to the award of $375,000 in compensatory damages, the jury awarded Michael $10,000,000 in punitive damages. In accordance with Georgia law, this award was based on a finding by the jury that the defendants conduct was performed maliciously or with an entire want of care which would raise the presumption of conscious indifference to the consequences of running the ad. *General Refractories Co. v. Rogers*, 240 Ga. 228, 230 239 S.E.2d 795, 798 (1977); *Associated Health Systems, Inc. v. Jones*, 185 Ga. App. 798, 366 S.E.2d 147 (1988).

The Court finds that there was sufficient evidence before the jury to support a finding that the defendants' acted with an entire want of care so as to justify the imposition of punitive damages. In the opinion of the Court, however, an award of $10,000,000 in punitive damages is excessive in that a smaller sum will fully vindicate the purposes of punitive damages under Georgia law.[5] *Hos-*

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[5] In some cases, it has been noted that the term "punitive damages" is a misnomer to describe the damages allowable under O.C.G.A. § 51-12-5 (1982). *Wammock v. Celotex Corp.*, 835 F.2d 818, 820 n. 3 (11th Cir. 1988) (analyzing punitive damages under Georgia law). That code section has since been amended to make the term "punitive damages" under Georgia law synonymous with the terms "vindicative damages" or "exemplary damages," which are commonly used to describe damages designed to punish a defendant. O.C.G.A. § 51-12-5.1(a) (Supp. 1987). *See also Salsbury Laboratories v. Merieux Laboratories*, 908 F.2d 706, 715 (11th Cir. 1990) (applying Georgia law).

In addition to deterrence, one of the rationales for punitive damages under Georgia law is to compensate for "the wounded feelings of the plaintiff." These wounded feelings "are not the same in nature as ordinary mental pain and suffering resulting from a physical injury. The former expression relates to the self-respect, sensibilities or pride of a person." *Wammock*, 835 F.2d at 821 n. 5 (quoting *Interstate Life and Accident Co. v. Brewer*, 56 Ga. App. 599, 609 193 S.E. 458, 464 (1937)). Accordingly, there is no duplication in plaintiff Michael Braun's award of compensatory and punitive damages.

pital Authority of Gwinnett County v. Jones, 259 Ga. 759, 386 S.E.2d 120, 122 (1989).

IV. *REMITTITUR*

Given that the Court finds that the jury's award of punitive damages is excessive, the Court must determine what remedy is appropriate. Although in some cases, the court may grant a new trial where the award of damages by the jury is excessive, the court also has the discretion to "use the remittitur practice whereby it denies the defendant's motion for a new trial on condition the plaintiff remits a stated amount." *Wilson*, 733 F.2d at 1549 (quoting 6A *Moore's Federal Practice* § 59.08[6] (2d ed. 1983)). In light of the evidence presented in this case, the Court finds that remittitur is appropriate.

Once the court has determined that a verdict is excessive and that remittitur is appropriate, the amount of the remittitur must be set. In fixing the amount of remittitur in lieu of a new trial, this Court is guided by the "maximum recovery rule." *Jackson*, 742 F.2d at 1306-07. Under this rule, the court reduces the award to the "maximum limit of a reasonable range within which the jury may properly operate." *Warren*, 693 F.2d at 1380 (citations omitted).

As noted, an award of punitive damages is for the purpose of deterring the defendant and others from committing similar wrongs in the future and to serve as compensation for the "wounded feelings" of the plaintiff.[6] In the opinion of the Court, an award of $2,000,000 would sufficiently serve to deter defendants and others from running similar ads, as well as providing sufficient compensation for Michael Braun's "wounded feelings." Accordingly, the Court finds that a remittitur of punitive damages in Michael Braun's personal injury case in

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[6] *See* note 5, *supra*.

the amount of $8,000,000 is required, leaving a punitive damages award of $2,000,000. An order in accordance with this opinion will be entered separately.

DONE this 23rd day of January, 1991.

/s/ Truman Hobbs
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 88-H-314-N

MICHAEL F. BRAUN,
Plaintiff

vs.

SOLDIER OF FORTUNE MAGAZINE, INC. &
OMEGA GROUP, LTD.,
Defendants

Civil Action No. 88-H-315-N

MICHAEL F. BRAUN & IAN BRAUN,
Plaintiffs

vs.

SOLDIER OF FORTUNE MAGAZINE, INC. &
OMEGA GROUP, LTD.,
Defendants

ORDER

[Filed Jan. 23, 1991]

In accordance with the attached memorandum opinion, it is hereby ORDERED:

1. That defendants' motion for a judgment notwithstanding the verdict is denied;

2. That defendants' alternative motion to set aside the verdict and judgment entered thereon and grant de-

fendants a new trial will be granted, unless plaintiffs agree to a remittitur of $8,000,000 to reduce the punitive damages award to $2,000.000. If plaintiffs agree to the proposed remittitur, defendants' motion for a new trial will be denied. *Plaintiffs shall inform the Court of their intentions by February 1, 1991.*

DONE this 23rd day of January, 1991.

/s/ Truman Hobbs
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 88-H-314-N

MICHAEL F. BRAUN,
Plaintiff

vs.

SOLDIER OF FORTUNE MAGAZINE; *et al.*,
Defendants

Civil Action No. 88-H-315-N

MICHAEL F. BRAUN; *et al.*,
Plaintiffs

vs.

SOLDIER OF FORTUNE MAGAZINE; *et al.*,
Defendants

MEMORANDUM OPINION AND ORDER

[Filed Jun. 22, 1990]

On August 14, 1989, defendants Soldier of Fortune Magazine, Inc. and Omega Group, LTD filed motions for summary judgment on plaintiffs' claims. On February 12, 1990, defendants supplemented their motion. The plaintiffs responded on February 20, 1990, to which the defendants replied on February 26, 1990.

FACTS

On August 26, 1985, Shawn Trevor Doutre stood in Richard Braun's driveway and fired at Braun's car with a MAC 11 automatic pistol as Braun drove from his driveway. Braun rolled out of his car, falling face down on the driveway. Doutre ran over to Braun, and fired two rounds into the back of Braun's head. Braun's sixteen-year-old son, Michael, was in the car with his father. He too rolled out of the car and lay on the other side of the driveway. After killing Braun, Doutre walked over to Michael, raised his gun, but did not fire. Instead, he put his finger over his lips and ran. Michael suffered a gunshot wound to his thigh, but survived.

Doutre worked with Richard Savage. Savage had been hired by Bruce Gastwirth, Braun's business associate, to kill Braun. Gastwirth hired Savage through a personal advertisement run by Savage in Soldier of Fortune Magazine (hereinafter "SOF"). That ad read:

> GUN FOR HIRE: 37-year old professional mercenary desires job. Vietnam Veteran. Discreet and very private. Body guard, courier, and other special skills. All jobs considered. Phone (615) 436-9785 (days) or (615) 436-4335 (nights), or write: Rt. 2, Box 682 Village Loop Road, Gatlinburg, TN 37738 (97).

Michael and his elder brother Ian Braun filed claims against SOF, its parent company Omega Group, and Gastwirth for the wrongful death of their father. Michael also has a separate action against these defendants for his injuries.

DISCUSSION

a. The Defendants' Duty to Screen Personal Advertisements

The defendants SOF and Omega Group seek summary judgment, asserting that both the First Amendment and

principles of tort law forbid imposing liability on a publisher for advertisements printed in its publications which do not overtly promote illegal transactions. They argue that the words "gun for hire," and "all jobs considered" are at best ambiguous, and that imposing liability on a publisher for publishing ambiguous ads is overburdensome. Thus, they argue, the Court should determine that the defendants had no duty to screen its personal ads and pull this particular advertisement from its want ad section.

The defendants' argument that the ad's ambiguity released the publisher from any duty is not well taken. Where the ambiguity lies in whether an ad, on its face, suggests murder for hire, the Court is unwilling to rule that lack of precision in drafting absolves the defendants. Applying the familiar balancing test applied in *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir. 1989) and accepted under Georgia law, *Ely v. Barbizon Towers, Inc.*, 101 Ga.App. 872, 115 S.E.2d 616 (1960), this Court believes that the likelihood and gravity of the possible harm from an advertisement which, on its face, implies that the advertiser is available to kill others is so great, and that the social utility of advertising criminal activity is so small, that imposing a duty on the publisher not to publish the ad is justified.[1] *See* Prosser & Keeton, *The Law of Torts* § 31 at 170-71 (5th ed. 1984); *Restatement (Second) of Torts*, §§ 291, 292 (1965).

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[1] The defendants argue that Georgia law does not impose a duty on a defendant to control the acts of third person except where a special relationship exists between the defendant and that third person or the person injured. Georgia law, however, does impose a duty on defendants where the defendant's affirmative acts create a foreseeable risk of danger. *United States v. Aretz*, 248 Ga. 19, 280 S.E. 2d 345 (1981). Thus, the Court is not contravening Georgia law in deciding that SOF has a duty not to publish advertisements that are reasonably construed as soliciting jobs which involve murdering others.

This is not a case where the product advertised is basically a safe product but which may have dangerous uses or propensities in the hands of certain users. *See Walters v. Seventeen Magazine*, 191 Cal.App.3d 1119, 241 Cal.Rptr. 101 (Ct. App. 1987); *Yuhas v. Mudge*, 129 N.J. Super. 207, 322 A.2d 824 (Sup. Ct. App. Div. 1974). Nor is the wording of the ad so facially innocuous that, absent knowledge that the advertiser was soliciting murder contracts, the risk of murder was unforeseeable as a matter of law.[2] *Eimann v. Soldier of Fortune Magazine*, 880 F.2d 830 (5th Cir. 1989). Rather, the Court believes that the language of this advertisement is such that, even though couched in terms not explicitly offering criminal services, the publisher could recognize the offer of criminal activity as readily as its readers obviously did. *See United States v. Hunter*, 459 F.2d 205, 213 (2d Cir.), *cert. denied*, 409 U.S. 934 (1972). Of course, in this Court's opinion the foreseeability of the criminal activity is ultimately a question for the jury, and that is where this case should be decided.[3]

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[2] The defendants attempt to compare the words "gun for hire" the more commonly used phrase "hired gun," arguing that these two phrases are essentially the same. Although placing those words in Soldier of Fortune Magazine may not give them any hidden or code meaning, the placement of the words "gun for hire" in the same ad as "all jobs considered," "discreet and very private," "professional mercenary," and "other special skills" certainly gives additional meaning to the phrase. Defendants [*sic*] comparison of that phrase, as used in the ad in question, with the phrase "hired gun," as used in describing politicians, lawyers, and professional expert witnesses, borders on the absurd.

[3] The defendants also argue that summary judgment must be granted for want of proximate cause. As a general matter, an intervening criminal act of a third party will supersede any negligence on the part of a defendant under Georgia law, the applicable law in this case. *Rosinek v. Cox Enterprises, Inc.*, 166 Ga.App. 699, 305 S.E.2d 393, 394 (1983). "[H]owever, if the criminal act was a reasonably foreseeable consequence of the defendant's conduct, the causal connection between that conduct and the injury is not broken." *Id.* at 395. Except in indisputable cases, questions of

The defendants' argument that the First Amendment protects their ad publications is similarly rejected. While commercial speech [4] is protected under the First Amendment, that protection does not extend to advertising commercial activity which is itself illegal. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 772 (1976), *citing with approval*, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). Any argument that this limit on First Amendment protection applies only to overt solicitations of criminal activity fails in light of the Supreme Court's decision in *Pittsburgh Press* and the facts of that case. There, the Court upheld the Human Relations Commission's order banning the practice of placing job opening advertisements under columns headed "Jobs—Male Interest" and "Jobs—Female Interest." The Court found that Pennsylvania law made employment discrimination based on sex illegal, that these ads, as placed in labelled columns, proposed illegal employment discrimination, 413 U.S. at 388, and that, therefore, the First Amendment did not apply.

The Court was not hindered by the ad's failure to expressly state that the employer intended to discriminate. Nor did the Court give credence to Pittsburgh Press's argument that any expression of illegal intent was clouded by the paper's announcement in its want ad section that an ad's placement in a particular column did not indicate an employer's sexual preference in hiring. After comparing the ads at issue to advertisements expressly selling prostitution or narcotics, which certainly would not be given First Amendment protection, the Court stated

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foreseeability and proximate cause are best reserved for the jury. *Id.* The Court, therefore, will not resolve the issue of causation on summary judgment.

[4] The defendants do not contest that the ad and its content are commercial speech which do "no more than propose a commercial transaction." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. at 385.

> [t]he illegality in this case may be less overt, but we see no difference in principle here. . .
>
> . . .
>
> The advertisements . . . signaled that the advertisers were likely to show an illegal preference in their hiring decisions. The First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguable outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal.

413 U.S. at 388-89. The Supreme Court's language in *Pittsburgh Press* provides ample support for this Court's decision that an advertisement which does not contain an express offer to murder others but which contains language easily interpreted as such an offer is not protected by the First Amendment.

b. Statute of Limitations on the Wrongful Death Claims

The defendants assert that the statute of limitations bars Michael and Ian's wrongful death claims. The statute of limitations in a wrongful death claim is determined by the nature of the injury sustained by the decedent. *Adair v. Baker Brother, Inc.*, 185 Ga.App. 807, 366 S.E.2d 164, 165 (1988). In this case, then, the two year personal injury limitations period would apply. *Id.* Braun was killed on August 26, 1985. This complaint was not filed until March 31, 1988. Michael, however, was a minor at the time of his father's death.[5] Under Ga. Code sec. 9-3-90, the statute of limitations is tolled as to minors until they reach the age of majority. The limitations period on Michael's claim, therefore, did not begin to run until February 15, 1987 when he turned 18, placing the March, 1988 filing well within the limitations period.

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[5] A minor is defined under Georgia law as anyone under the age of 18 years. Ga. Code sec. 39-1-1.

Ian, however, was not a minor at the time of his father's death. Nevertheless, Ian may benefit from Michael's minority status under Ga. Code sec. 9-3-95, That statute provides that

> [w]here there is a joint right of action and one or more of the persons having the right is under any of the disabilities specified in Code Section 9-3-90, the terms of limitation shall not be computed against the joint action until all the disabilities are removed. However, if the action is severable so that each person may bring an action for his own share, those free from disability shall be barred after the running of the applicable statute of limitations, and only the rights of those under disability shall be protected.

Thus, if a wrongful death claim is a joint action, a question which the Court reserves ruling on at this time,[6] Ian's claim was tolled so long as Michael was a minor.

Likewise, Ian's claim may be tolled under Georgia's discovery rule. That rule dictates that a cause of action in tort does not accrue for purposes of running the statute of limitations until a person knows or reasonably should know that there is injury and knows or reasonably should know the cause of that injury.[7] *Synalloy Corp. v. Newton*, 254 Ga. 174, 326 S.E.2d 470 (1985). Ian alleges that, even in the exercise of due diligence, he could

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[6] *See*, n.8 supra.

[7] The defendants argue that the discovery rule no longer applies under the ruling of *Corporation of Mercer University v. National Gypsum Co.*, 258 Ga. 365, 368 S.E.2d 732 (1988). That case held that the discovery rule does not apply to property damage cases, but did not disturb its applicability to personal injury cases. As the statute of limitations applicable to wrongful death cases is determined by the nature of the injury, and the nature of the injury in this case was personal injury, the Court finds that the discovery rule applies to this wrongful death action as it would to personal injury actions.

not have known of the circumstances of his father's death until May, 1986 when a story appeared linking the defendants to his father's death. Whether Ian knew or could have known of the defendants' involvement prior to May, 1986 would be a question for the jury. Thus, under either approach to the statute of limitations question, summary judgment could not be granted against Ian's wrongful death claim.[8]

c. Punitive Damages

Finally, the defendants argue that the plaintiffs' request for punitive damages on the wrongful death claim must be dropped because Georgia law does not permit such damages in a wrongful death claim. *See Berman v. United States*, 572 F.Supp. 1486 (N.D. Ga. 1983). The plaintiffs, however, only ask for compensatory damages with respect to their wrongful death claim, mooting the defendants' argument. Michael has asked for punitive damages under his personal injury claim, but whether

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[8] The Court reserves ruling on which approach to the statute of limitations question is appropriate in this case. Georgia's wrongful death statute has gone through several changes over the years. In particular, in 1985 Ga. Code sec. 51-4-3, which provided a cause of action for the wrongful death of a wife and mother was repealed. In the same year, Ga. Code sec. 51-4-2, which provided a cause of action for the wrongful death of a husband and father, was amended to give a wrongful death cause of action to the "surviving spouse or, if there is no surviving spouse, a child or children" of the decedent. It is not clear under the new statute whether each beneficiary named under the wrongful death statute has a separate cause of action against the tortfeasor, *see Walden v. Coleman*, 217 Ga. 599, 124 S.E.2d 265 (1962) (interpreting old sec. 51-4-2), or whether the tortfeasor may be sued only once in a joint action by all beneficiaries. *See, Happy Valley Farms, Inc. v. Wilson*, 192 Ga. 830, 16 S.E.2d 720 (1941) (interpreting old sec. 51-4-3); *Southeastern Greyhound Lines v. Wells*, 204 Ga. 814, 51 S.E.2d 569 (1949) (interpreting old sec. 51-4-2); *Gordon v. Gillespie*, 135 Ga. App. 369, 217 S.E.2d 628 (1975) (interpreting old sec. 51-4-2). Under either the discovery rule or the joint cause of action rule, however, summary judgment could not be granted on Ian's claim.

the defendants acted maliciously or with an entire want of care, the standard for awarding punitive damages, *Associated Health Systems, Inc. v. Jones*, 185 Ga.App. 798, 366 S.E.2d 147 (1988), is not a question which the Court will attempt to resolve on a motion for summary judgment.

Accordingly, defendants' motions for summary judgment are DENIED.

DONE and ORDERED this 22nd day of June, 1990.

/s/ Truman Hobbs
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 88-H-314-N

MICHAEL F. BRAUN,

Plaintiff

vs.

SOLDIER OF FORTUNE MAGAZINE; *et al.*,

Defendants

Civil Action No. 88-H-315-N

MICHAEL F. BRAUN; *et al.*,

Plaintiffs

vs.

SOLDIER OF FORTUNE MAGAZINE; *et al.*,

Defendants

ORDER

[Filed Jun. 22, 1990]

The above styled cases are hereby consolidated for all further proceedings, including trial. Rule 42(a), Federal Rules of Civil Procedure.

These consolidated cases are rescheduled for a pretrial hearing on October 17, 1990 (exact time to be furnished by further order) and for the trial term commencing December 3, 1990. Paragraphs (2) through (6) of the Court's Rule 16 Orders, issued July 15, 1988, are governed by the rescheduled dates.

DONE this 22nd day of June, 1990.

/s/ Truman Hobbs
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-7130

D. C. Docket Nos. 88-H-314-N
88-H-315-N

MICHAEL F. BRAUN,
Plaintiff-Appellee,

versus

SOLDIER OF FORTUNE MAGAZINE, INC.
and OMEGA GROUP, LTD.,
Defendants-Appellants.

MICHAEL F. BRAUN and IAN BRAUN,
Plaintiffs-Appellees,

versus

SOLDIER OF FORTUNE MAGAZINE, INC.
and OMEGA GROUP, LTD.,
Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Alabama

Before ANDERSON and DUBINA, Circuit Judges, and ESCHBACH *, Senior Circuit Judge.

ESCHBACH, Senior Circuit Judge, dissented and filed an opinion.
* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

JUDGMENT

[Filed Aug. 13, 1992]

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that defendant-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: August 13, 1992

For the Court: MIGUEL J. CORTEZ
Clerk

By: /s/ Karleen McNabb
Deputy Clerk

Issued As Mandate: Sep. 9, 1992